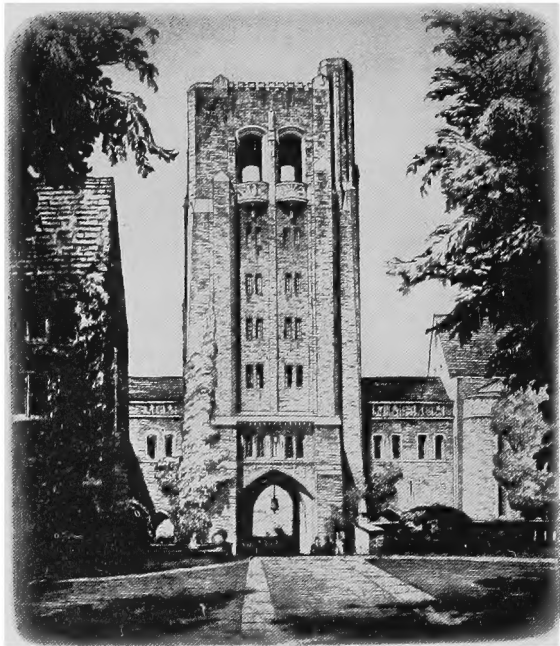


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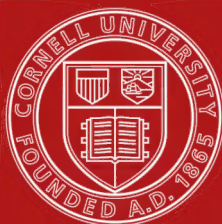
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SUPPLEMENT
TO
A TREATISE
ON THE LAW OF
MUNICIPAL CORPORATIONS

By EUGENE McQUILLIN, LL.D.

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SUPPLEMENT

VOL. VIII

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- § 1614. Definition and nature.¹
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- § 1617. Same—grant to use streets usually held to be a franchise.³
- § 1618. What are “public utilities.”⁴

The term “public utilities” includes railways, both

¹Lindsley v. Dallas Consol. St. Ry. Co. (Tex. Civ. App. 1918), 200 S. W. 217, 212, quoting with approval from § 1614, vol. 4, ante.

A franchise is a privilege emanating from the state's sovereign power. *People v. Continental Beneficial Assn.*, 280 Ill. 113, 117 N. E. 482.

Authority to use streets is a

franchise. *Bradley v. Degnon Contracting Co.*, 140 N. Y. S. 825, 80 Misc. Rep. 90.

² Sullivan v. Central Illinois Public Service Co. (Ill. 1919), 122 N. E. 58, 59.

³Dallas v. Gill (Tex. Civ. App.), 199 S. W. 1144, 1145, quoting with approval from § 1617, vol. 4, ante.

⁴Spangler v. Mitchell, 35 S. D.

steam and street, whatever their motive power;⁵ and electric light plants.⁶

§ 1619. Control over by state commissions.

State commissions, variously called public service, public utility, corporation, or railroad commissions, exist in most of the states, sometimes created by constitutional provisions, but generally by statutes. These commissions control to a large extent and regulate the service and rates of public service companies or public utilities within their respective states.⁷

A constitutional provision forbidding the legislature of the state from enacting a law granting the right to construct and operate a street railroad in any city of the state "without first acquiring the consent of the local

335, 347, 152 N. W. 339, citing § 1618, vol. 4, ante.

⁵ Street railway is a public utility as distinguished from a local improvement. *Jahn Contracting Co. v. Seattle*, 74 Wash. 298, 133 Pac. 458.

Injunction to restrain construction of railroad and moving of freight cars over same, holding that street railway enfranchised as a public utility may move freight cars over its tracks under reasonable restrictions. *Turner v. North Carolina Public Service Co.*, 170 N. C. 172, 86 S. E. 1033.

⁶ *Colorado Springs v. Pike's Peak Hydro-Electric Co.*, 57 Colo. 169, 140 Pac. 921.

⁷ Section 229, A. ante.

Public service commission of Massachusetts is clothed with full power to regulate and to require safe, reasonable and adequate service to the public from all common carriers and to regulate rates. *Arlington Board of Survey v. Bay*

State St. Ry., 224 Mass. 463, 113 N. E. 273.

Application to public service commission for certificate of public convenience and necessity to run an auto bus line on route parallel to a street railway where such certificate was granted. Commission has discretion to exercise power, which the legislature has given it, for the interest of the public. "The primary object of the public service laws is not to establish a monopoly or to guarantee the security of investments in public service corporations but first and at all times in the just exercise of its powers to serve the interest of the public." *Pottsville Traction Co. v. Public Service Commission*, 67 Pa. Super. Ct. 301, 304, 307.

Control of a particular utility by special terminals commissioners. *McCutcheon v. Buffalo Terminal Comm.*, 154 N. Y. S. 711, affirming 150 N. Y. S. 850, 88 Misc. Rep. 148.

authority having control of the street or highway proposed to be occupied by said street railroad," vests the power to consent in the local authorities, and hence a public service commission of the state has no power, although a state statute attempts to authorize it to do so, to order a company operating a street railway on certain streets of a city, to apply to the municipal authorities for a franchise to construct and operate a street railway on other streets. Extensive powers conferred by a state statute on such commission to order a street railway to construct additional tracks and make such changes, improvements and additions as may promote the security and convenience of the public or secure adequate service or facilities for the transportation of passengers are to be construed as subservient to and in harmony with such constitutional provisions, and not as authorizing the commission to order the railway company to take the initiative in procuring the required consent. However under such law, the commission has power to order the construction of such side-tracks, switches, cross-overs and terminals as are incidental to the operation of the main lines of an existing railway corporation; but the state legislature has no constitutional authority, and hence the commission is not empowered, to compel such corporation in the absence of authority in its charter, to enter new territory by the extension of its lines of railway upon other public streets.⁸

II. NECESSITY FOR.

§ 1620. Necessity for obtaining consent of the municipality to use of streets.⁹

⁸ State ex rel. v. Public Service Commission, 270 Mo. 429, 437, 443, 192 S. W. 958.

⁹ See § 185, ante; § 185, vol. 1, ante; Cummins v. Jones, 79 Or. 276, 155 Pac. 171; Dickey v. Davis, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915 F, 840, 847, P. U. R. 1915 E, 93, quoting with approval from § 1620, vol. 4, ante.

State may surrender to municipality its control over streets in matter of granting franchise by constitutional provisions. Billings v. Cleveland Ry. Co., 92 Ohio St. 478, 488, 111 N. E. 155, citing § 1620, vol. 4, ante.

Where the legislature has granted to municipal corporations full power over streets, ways and

§ 1621. Same—telegraph and telephone companies.¹⁰

Where a city has exclusive control over its streets for certain purposes with authority to grant right of user to public service corporations, it can make a contract with a telephone company for use of streets which is binding as to the city and company but such contract will not bar the state from exercising its power to regulate.¹¹

§ 1622. Same—express grant not necessary.¹²

III. POWER TO GRANT OR REFUSE.

§ 1623. Power of legislature.¹³

alleys within the corporate limits, it must in granting franchise to a railway company, require that company obtain consent from city before laying its tracks. In giving permission, city is merely exercising its police power over the manner of exercise of the right granted by the state. *State v. B. & O. R. R. Co.*, 127 Md. 434, 96 Atl. 636.

¹⁰ *Iowa Telephone Co. v. Keokuk*, 226 Fed. 82, following *Chamberlain v. Iowa Tel. Co.*, 119 Iowa 619, 93 N. W. 596.

¹¹ *Winifield v. Public Service Comm. (Ind.)*, 118 N. E. 531.

¹² *Valdez v. Valdez Dock Co.*, 5 Alaska 399, 407, approving text in § 1622, vol. 4, ante.

¹³ Section 227 et seq., ante; § 227 et seq., vol. 1, ante; § 1310, ante; § 1310, vol. 3, ante.

Power is primarily in legislature. *Eastern Telephone and Telegraph Co. v. Board of Public Utility Comm.*, 85 N. J. L. 511, 89 Atl. 924, affirmed in 87 N. J. L. 318, 319, 93 Atl. 1084; *Grand Trunk Western Ry. Co. v. South Bend*, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. ed.,

reversing 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L. R. A. (N. S.) 850.

The legislature may subsequently limit authority given by it to municipalities to grant a privilege or franchise to a public utility by requiring that such a grant shall not be valid until approved by a board of public utilities. *Eastern Telephone & Telegraph Co. v. Board of Public Utility Comm.*, 85 N. J. L. 511, 89 Atl. 924, affirmed in 87 N. J. L. 318, 319, 93 Atl. 1084.

Constitutional provision that no railroad shall be constructed within any city without consent of the local authorities having control over streets to be occupied does not withhold from the legislature the power to prohibit municipalities from granting right to occupy streets except on terms which the legislature may impose, but gives municipalities authority to impose additional term or withhold consent entirely. *Denver v. Mercantile Trust Co.*, 201 Fed. 790, 120 C. C. A. 100.

Granting by city is regarded as

§ 1624. Power of municipality.¹⁴

act of state. *State v. Des Moines City Ry. Co.*, 159 Iowa 259, 140 N. W. 437.

In granting right to use street by a railway the city acts as the agent of state (as to location here), and hence, the legislature may change or abrogate the terms of location, without violation of any constitutional provision. *Board of Survey of Arlington v. Bay State Street Ry. Co.*, 224 Mass. 463, 113 N. E. 273.

Legislature may relieve corporation from making repairs. *Fall River v. Public Service Commission*, 228 Mass. 575, 117 N. E. 915; *Worcester v. Worcester Consolidated Street Ry.*, 182 Mass. 49, 52, 64 N. E. 581, 582.

¹⁴*State ex rel. v. Milwaukee El. Ry. & Light Co.* (Wis. 1919), 172 N. W. 230, 233.

May grant right to operate a street railroad in streets. *Cape Girardeau-Jackson Interurban Ry. Co. v. Light & Development Co.* (Mo. 1919), 210 S. W. 361.

No inherent power to grant in city. *State v. Des Moines City Ry. Co.*, 159 Iowa 259, 140 N. W. 437; *Portland v. Public Service Commission*, 89 Or. 325, 173 Pac. 1178.

Authority to use streets for railroad purposes is a franchise proceeding from the state and the municipality has no power in respect thereto except such as is expressly given by statute and then only in manner and upon conditions prescribed. *Bradley v. Degnon Contracting Co.*, 140 N. Y. S. 825, 80 Misc. Rep. 90, affirmed in 141 N. Y. S. 852, 157 App. Div.

237, which was an injunction by abutting owner to restrain operation of street railway under permit from municipal authorities who were not authorized to grant such privilege.

City cannot grant to street railway without authority. *People ex rel. New York City v. New York Railways Co.*, 217 N. Y. 310, 112 N. E. 49, affirming 155 N. Y. S. 1133, 171 App. Div. 910.

City may contract with electric lighting company for lighting of public streets but such power does not include authority to grant a franchise to use street for purpose of supplying current to private consumers. *People ex rel. Clemens v. Williams*, 166 N. Y. S. 560, 100 Misc. Rep. 569.

Consent of voters is not required where city is given power to grant. *Mandeville Ice & Light Co. v. Mandeville*, 139 La. 286, 71 So. 512.

Legislative grant of power to city council to grant franchise is conclusive and controls charter of city which cannot restrict the power given to the council. *Dolan v. Puget Sound T. L. & P. Co.*, 72 Wash. 343, 130 Pac. 1353.

Approval by state board is sometimes required. *Oro Electric Corporation v. Railroad Commission*, 169 Cal. 466, 147 Pac. 118.

Under express authority city may grant right to interurban railway to use its streets. *Auhalt v. Waterloo, C. F. & N. Ry. Co.*, 166 Iowa 479, 147 N. W. 928.

Power given a city to grant use of streets for a commercial road. *Taylor County Court v. Grafton*, 118 W. Va. 153, 86 S. E. 924.

§ 1627. Same—power to grant for private purposes.

The municipal corporation holds its streets and pub-

Under authority from the legislature, city may grant right to use streets to carriers not operating on fixed tracks, as jitneys. *Memphis Street Ry. Co. v. Rapid Transit Co.*, 138 Tenn. 594, 198 S. W. 890.

Power to grant for gas pipes. *Albany v. McGolfrick*, 79 Or. 462, 155 Pac. 512; *Federal Gas & Fuel Co. v. Columbus*, 96 Ohio 530, 118 N. E. 103.

Under power conferred by state, city may grant franchise to operate a ferry between termini within city limits, even though one terminus is upon land over which the United States has exclusive jurisdiction. *Vallejo Ferry Co. v. Solano Aquatic Club*, 165 Cal. 255, 804, 131 Pac. 864, 874.

Case to test validity of an ordinance requiring all telephone company operating within city to secure a franchise from city. Charter power of city to authorize erection and maintenance of a telephone system, does not give it authority to require a telephone company, which has acquired right to use streets under state statute prior to grant of city charter, to procure a franchise from the city. City's power should not be so construed as to enable it to impair contract relations existing between the telephone company and the state. *Iowa Telephone Co. v. Keokuk*, 226 Fed. 82.

By amendment to New York constitution of 1874, the designated city officials representing the city and the Public Service Commission

representing the State are the agencies through which the legislature grants railroad franchises. *Stanley v. Jay St. Connecting R. R.*, 169 N. Y. S. 530, reversing 166 N. Y. S. 119, 100 Misc. Rep. 493.

Mandamus to compel city to permit telephone company to use its streets. Where legislature has conferred discretionary power to grant franchise on municipalities, court cannot compel city to grant franchise to a particular company. *State ex rel. Evansville Telephone Co. v. Stickelman*, 182 Ind. 102, 105 N. E. 777.

Injunction by abutting property owners to prevent construction of street railway where city has authority by charter adopted under the constitution to grant franchise. Compliance with a state statute requiring consent of property owners is not necessary in granting a franchise where such statute is inconsistent with the constitution. *Billings v. Cleveland Ry. Co.*, 92 Ohio St. 478, 111 N. E. 155.

City cannot grant to railway company, the right to use its streets to the exclusion of the public therefrom. *State of Washington v. Jefferson County Super. Ct.*, 91 Wash. 454, 157 Pac. 1097, which was a condemnation proceeding by railway company to condemn certain streets.

Power to provide street lighting, etc., held authority to grant a franchise to a corporation to supply light to the inhabitants. *Watertown v. Watertown Light & Power Co.* (S. D. 1919), 173 N. W. 739.

lic ways in trust for public use,¹⁵ and is therefore without authority to grant a permit for a private purpose, e. g., for the erection of a booth in a street for conducting a private business.¹⁶

§ 1629. Power of municipality to refuse to allow use of streets.¹⁷

§ 1632. Propriety of grant of franchise not subject to review.¹⁸

IV. EXCLUSIVE RIGHTS.

§ 1633. Power to grant exclusive franchises.¹⁹

¹⁵ Section 229, vol. 1, ante; § 1311, vol. 3, ante.

¹⁶ *Winter Bros. v. Mays*, 170 Ky. 554, 186 S. W. 127.

See § 1311 et seq., ante; § 1311, et seq., vol. 3, ante.

¹⁷ Statutes vest municipalities with power to grant or refuse permission, within their discretion, to an electric company to place its appliance in streets or public way, either above or below ground. *Holland Realty & Power Co. v. St. Louis* (Mo. 1920), 221 S. W. 51, 54, citing § 1629, vol. 4, ante.

Municipal official who is given authority to grant a permit to dig into streets cannot nullify one franchise of a gas company by refusing a permit, but he may require that the company submit to certain regulations as to the manner of exercising the right. *People ex rel. Queens Borough Gas Co. v. Connolly*, 153 N. Y. S. 721, 89 Misc. Rep. 555.

¹⁸ An ordinance passed by a municipality cannot be held invalid on any other ground than that of its illegality. It is not within the

province of the court to say that a valid ordinance is unwise or impolitic. Action to enjoin sale of a franchise for supplying gas, on the ground that proposed sale and franchise were illegal under a state statute. *Cathright v. H. M. Byllesby Co.*, 154 Ky. 106, 157 S. W. 45.

¹⁹ A municipality cannot grant an exclusive franchise without power so to do. *Seaboard Air Line Ry. Co. v. Raleigh*, 219 Fed. 573.

Municipality cannot grant the privilege to one to use its streets and alleys to the exclusion of another, to whom it may grant a franchise to use them for the same purposes. *Princeton v. Princeton L. & P. Co.*, 166 Ky. 730, 179 S. W. 1074.

Constitutional provisions against monopolies forbid the granting of exclusive franchises. *Ennis Waterworks v. Ennis*, 105 Tex. 63, 144 S. W. 930, affirming (Tex. Civ. App.), 136 S. W. 513.

Where in a franchise to a company authorizing it to lay water mains and furnish water there was

§ 1634. Exclusive use of street as distinguished from exclusive franchise.²⁰

§ 1635. Construction of franchise as to exclusiveness.²¹

V. PROCEDURE TO OBTAIN.

§ 1638. Application for franchise and action thereon.²²

When consent to use public streets and ways can be

an additional grant of a right to supply the city and its inhabitants with water for thirty years, being unnecessary to complete a grant of the mere right to furnish water, it was held to intend an exclusive grant which invalidated the franchise under the constitution forbidding monopolies. *Ennis Waterworks v. Ennis*, 105 Tex. 63, 144 S. W. 930, affirming (Tex. Civ. App.), 136 S. W. 513.

Sale of franchise for supplying water to highest bidder was held to constitute a grant of an exclusive right to supply water and therefore contrary to the state constitution which prohibits grant of exclusive privilege. *St. Helena v. Ewer*, 26 Cal. App. 191, 146 Pac. 191.

Charter authority given a city to enter into a contract for a public supply of water and lights for a term of years, necessarily authorized it to give an exclusive franchise in the streets for the purpose of furnishing the public service contracted for. *La Follette v. La Follette Water Co.*, 252 Fed. 762.

After granting right to establish a street railroad the municipality itself may establish a street railroad system where not forbidden by the franchise previously

granted. *United Railroads of San Francisco v. San Francisco*, 249 U. S. 517, 39 Sup. Ct. 361, affirming 239 Fed. 987.

²⁰ Law forbidding two street railroads from occupying the same street for more than five blocks, which was contained in an existing franchise under which a street railroad was operating in the city, was held inapplicable to a municipal street railroad system. *United Railroads of San Francisco v. San Francisco*, 249 U. S. 517, 39 Sup. Ct. 361, affirming 239 Fed. 987.

²¹ *Seaboard Air Line Ry. Co. v. Raleigh*, 219 Fed. 573.

"Grants of public rights by municipalities to individuals are to be strictly construed in favor of the public as against the individual." *Ennis Waterworks Co. v. Ennis*, 105 Tex. 63, 154 S. W. 930, 934; *Peterson v. Taconia Ry. and Power Co.*, 60 Wash. 406, 412, 111 Pac. 338, 140 Am. St. Rep. 936, 941, citing § 1635, vol. 4, ante (*McQuillin*, Mun. Ord. § 578.)

"An exclusive grant will not be implied unless given by express terms or by clear implication." *Ennis Waterworks v. Ennis*, 105 Tex. 63, 144 S. W. 930, 934, affirming (Tex. Civ. App.), 136 S. W. 513.

²² Grant of a franchise is invalid

obtained only from the municipal legislative body, and in a particular mode, as by ordinance, the local administrative officers cannot waive the necessity of procuring such consent, and in the mode prescribed. Neither can they by acquiescence in the use of a public way by a public service company estop the municipality to terminate the use.²³

§ 1639. Submitting franchise to vote of people.²⁴

§ 1640. Consent of abutters.²⁵

§ 1641. Sale of franchise to highest bidder.²⁶

where the method of granting prescribed by statute is not followed. Thus where an ordinance creating a franchise was not laid over for five days as required by law but passed on the same day it was introduced it is invalid. *Eastern Kentucky Home Tel. Co. v. Hatcher*, 166 Ky. 176, 176 S. W. 7.

Certificate of convenience or necessity to public in operating the proposed public utility to be obtained from state commission. *Re Kansas City Railways Co.*, 3 Mo. Public Service Com. Repts. 593, 614, P. U. R. 1916 E, 544, §§ 185, 227, 228, 229 A, et seq.; § 1642 A, post.

²³ *Holland Realty & Power Co. v. St. Louis* (Mo. 1920), 221 S. W. 51, 53.

²⁴ By statute, vote and approval of electors required of franchise to supply illuminating gas to inhabitants. *State v. Billings Gas Co.* (Mont. 1918), 173 Pac. 799.

Franchise for electric light, ice and water company. *Nogales Elec. Light, Etc., Company v. International Gas Co.*, 19 Ariz. 219, 168 Pac. 504.

²⁵ Since the constitutional amend-

ment of 1874 in New York, railroad franchises to occupy public streets and authority to construct and operate a street railroad cannot be granted except with consent of the local authorities and of owners of one-half in value of abutting property, or if consent of such owners is not given, the determination of a court that such railroad ought to be constructed is required. *Stanley v. Jay St. Connecting R. R.*, 169 N. Y. S. 530, reversing 166 N. Y. S. 119, 100 Misc. Rep. 493.

Charter provision authorizing city to permit running of street cars and laying of tracks upon the consent of owners representing more than one half of the frontage of the street to be used, is sufficiently complied with by an ordinance authorizing the street railway but requiring that consent of owners be obtained before construction. *Denver v. Mercantile Trust Co.*, 201 Fed. 790, 120 C. C. A. 100.

²⁶ *Princeton v. Princeton E. L. & P. Co.*, 166 Ky. 730, 179 S. W. 1074.

Municipal charter required city

§ 1642. Particular body or officer who may grant franchise.²⁷**§ 1642a. Certificate of public convenience and necessity.**

Certain public service corporations as a condition precedent to the exercise of the powers vested, or to the right to begin the construction of the road or plant, are required to obtain a certificate of public convenience and necessity from a named board or commission.²⁸

to consider offer to sell existing public utilities prior to the construction of new ones. A general solicitation of offers for sale to the city of any existing street railway in the city was passed by the legislative body and was ordered sent, and was sent to a street railroad in the city and others. Held, sufficient observance. *United R. of San Francisco v. San Francisco*, 249 U. S. 517, 39 Sup. Ct. 361, affirming 239 Fed. 987.

²⁷ "Municipal authorities" means the legislative authorities acting by ordinance. *Holland Realty & Power Co. v. St. Louis* (Mo. 1920), 221 S. W. 51, 53, citing § 1642, vol. 4, ante; *State ex inf. v. West End Light & Power Co.*, 246 Mo. 653, 666, 152 S. W. 76.

A corporation which has made use of a highway for many years under permission from a town board to which it had applied for the privilege, instead of to highway commissioner (as according to law under which it incorporated it should have done), cannot set up the fact to avoid compliance with conditions imposed by the town board in its grant while it continues to use the highway. *Farmworth v. Boro Oil Co.*, 216 N. Y.

40, 109 N. E. 860, affirming 139 N. Y. S. 736, 155 App. Div. 79, containing a dissenting opinion holding that as the town board had no authority, its assent and condition attached thereto was of no value for any purpose.

²⁸ *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 238, 141 Pac. 1083, Ann. Cas. 1916 E, 282; *Weston v. Railroad Comrs.*, 205 Mass. 94, 91 N. E. 303.

Question of fact. *People v. R. R. Comrs.*, 81 N. Y. S. 20.

Grant by municipality to use streets by public service corporation may be made subject to approval by board of public utilities. *Eastern Tel. & Tel. Co. v. Board of Public Utility Comrs.*, 85 N. J. L. 511, 89 Atl. 924, affirming 87 N. J. L. 318, 319, 93 Atl. 1084.

Certificate of public convenience and necessity to run an auto bus line on route parallel to a street railway, granted. *Pottsville Traction Co. v. Public Service Commission*, 67 Pa. Super. Ct. 301, 304, 307.

No common carrier or public utility governed by the provisions of this act shall "transact business in this state," until it shall have obtained a certificate from the public utilities commission that public

Thus public service commission laws provide, in substance, that no railroad, street railway, corporation or common carrier shall henceforth begin the construction of a railroad or street railway or of any extension thereof without having first obtained from a named commission a certificate that the present or future public convenience and necessity require or will require such construction;²⁹ that no gas corporation, electric corporation or water corporation shall begin construction of a gas plant, electric plant or water system without first having obtained the permission and approval of a specified commission;³⁰ and that no telegraph or telephone corporation hereafter formed shall begin construction of desired telegraph or telephone lines without first having obtained the permission and approval of a designated commission and its certificate of public convenience and necessity.³¹

Before action on the application for such a certificate, provision is made for a hearing thereon, and the com-

convenience will be promoted by the transaction of said business, etc. Held, not applicable to utilities now transacting business in the state. Held, also not applicable to a public utility, as a lighting plant owned and conducted by a municipality. *Humphreys v. Pratt City Comrs.*, 93 Kan. 413, 144 Pac. 197.

²⁹ Missouri Public Service Commission Law, § 53.

³⁰ Missouri Public Service Commission Law, § 72.

When not required for the construction and operation of municipal lighting plant. *Neacy v. Milwaukee*, 151 Wis. 504, 139 N. W. 409; *Humphreys v. Pratt City Commissioners*, 93 Kan. 413, 144 Pac. 197.

³¹ Missouri Public Service Commission Law, § 96.

Condition by legislature—approval by state board. Permission to erect poles—telegraph and telephone—which city may give by virtue of power so to do granted by legislature, is subject to the power of the legislature to impose conditions, and provide that no such franchise shall be valid, unless in addition to municipal consent, the public utility board of the state determines whether such franchise is necessary for public convenience and conserves the public interests properly, etc. All franchises must be approved by state board. *Eastern Telephone & Telegraph Co. v. Board of Public Utility Comrs.*, 85 N. J. L. 511, 89 Atl. 924, affirmed in 87 N. J. L. 318, 93 Atl. 1084.

mission after such hearing may issue the certificate or refuse to issue the same or may grant the application in whole or in part, and usually may attach to the exercise of the rights granted by the certificate, such terms and conditions as in its judgment the public convenience and necessity may require.

It is not intended by this requirement to substitute a commission for the local or municipal authorities, when by the constitution and laws of the particular jurisdiction the consent of such local authorities is necessary before the grant of a franchise could be complete, because the constitution and laws contemplated that such local or municipal authorities shall have power to impose such reasonable conditions as the convenience and necessity of the locality may require, and with such conditions for the exercise of the franchise a commission has no concern. Therefore, it cannot demand that the local authorities add to or take from the conditions upon which they were willing to consent. The state, however by its commission, has power to say that no franchise shall be acquired or exercised unless it is necessary or convenient for the public service; and hence by virtue of such statutory grant of authority it may impose upon a corporation or individual before such a franchise can be exercised the obligation of satisfying the commission that the construction of the proposed plant for public service, or the exercise of the franchise or privilege thereunder is necessary or convenient for the public service. This is the single question presented to such commission. It is all it is authorized to determine. Such determination follows a hearing and is in its nature judicial. Such commission cannot reject the application because of certain limitations imposed by the municipal authorities upon the franchise contract. That is, the commission has no right to reject arbitrarily an application because of the action of local authorities in granting or refusing their consent. It is not constituted a court to hear an appeal from the determination of the local authorities as to conditions which should be im-

posed on giving consent to the construction or operation of the proposed public utility. To repeat: The sole question for determination by the commission is whether the construction and operation of the proposed utility, or the exercise of the franchise or privilege, is necessary or convenient for the public service. If the commission so concludes its clear duty is to grant the certificate.³²

Under these laws it appears that the commission is restricted to the inquiry whether public convenience and necessity require the exercise of the rights and privileges granted by the franchise, without regard to the terms and conditions of such grant, because such terms and conditions are usually within the sole jurisdiction of the local authorities, and the commission is not responsible in any event for the terms and conditions imposed by such local authorities.³³

A constitutional provision requiring consent of the local authorities is a limitation of legislative power. It forbids the legislature from granting by law the right to construct and operate a street railway, for example, without first having acquired consent of the local authorities, etc., and the legislative power to transfer a franchise for this purpose so granted is usually restricted in like manner. After consent of the local authorities has been acquired so far as this constitutional restric-

³² *People ex rel. v. Willcox*, 133 N. Y. S. App. Div. 556, affirmed in 196 N. Y. 212, 217, 218.

³³ In proceedings for a certificate of public convenience and necessity the question of a conspiracy to evade the laws of the state in organizing a corporation, or the fact of ownership of stock of applicant by a foreign corporation are not subject to the jurisdiction of the state. *Re Kansas City Connecting Railroad Co.*, 2 Mo. P. S. C. 406, P. U. R. 1915 B, 661.

The provisions of the law seek to prevent duplication and waste-

ful competition and it is essential that "necessity" as well as "public convenience" exist. *Re Kansas City Rys. Co.*, 3 Mo. P. S. C. 593, P. U. R. 1916 E, 544.

The certificate will be denied if present and future convenience and necessity is not subserved. *Re Kansas City Connecting R. R. Co.*, 2 Mo. P. S. C. 406, P. U. R. 1915 B, 661.

If an existing company is able and willing to render the service a certificate will not be granted to a new company unless the new company promises improved service and

tion expressly provides, the legislature is free to take such action concerning the exercise of the rights and privileges under the franchise as it may deem appropriate or necessary for the public good. All rights and privileges thereunder may be defined and definitely prescribed by the local authorities, because all of these matters are contemplated in the act of "acquiring consent." Consent having been acquired and the terms and conditions thereof having been fixed precisely the state in the exercise of its undoubted police power, its unlimited supervision of public utilities and its unrestrained regulation of their property devoted to public service, reserves to itself the final word to say whether the exercise of the rights and privileges under the franchise by the grantee thereof will be promotive of the public convenience and necessity of the locality or localities in which they are to be exercised. Under a constitutional provision of New York considered by the court of appeals of that state, authority to construct and operate street railroads must be conferred by general laws, and then only on condition of obtaining the consent of the local authorities, and also of the owners of one-half in value of the property bounded on that portion of the street or highway upon which the proposed road is to be constructed, or in case the consent of property owners cannot be obtained, the section declares that "the general term of the supreme court, in the district in which it (the railroad) is proposed to be constructed, may, upon application, appoint three commissioners who shall determine whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

the plans of the existing company are objectionable or its service is inadequate. *Re Kansas City Connecting R. R. Co.*, 2 Mo. P. S. C. 406, P. U. R. 1915 B, 661.

Public service commission's action therein must be reasonable.

Courts may review the reasonableness of action thereon. Public interest is paramount. Elements to be considered where rival companies make application. *Chicago Motor Bus Co. v. Chicago Stage Co.* (Ill. 1919), 122 N. E. 477.

A general law of the state relating to the construction of surface street railways, in addition to embodying the above constitutional provisions, provided a third condition not enjoined therein, namely, that no surface street railroad company shall conduct, extend or operate its road or tracks in that portion of any street, avenue, road or highway in which a street railroad is or shall be lawfully constructed, except with the consent of the company owning and maintaining the same. It was urged that the condition named in the statute was void because not authorized by the Constitution. This objection was placed on two grounds, the first of which only is material here. It is that the Constitution has prescribed the conditions upon which street railroads may be constructed, and by implication excludes the imposition by the legislature of conditions other than those prescribed therein. Answering this contention, the court said that it "proceeds upon a misconception of the object of the constitutional provision, and of the rules governing the interpretation of constitutional restraints upon legislative power. The plain purpose of the Constitution in requiring the consent of the local authorities and of property owners to the construction of a street railroad, was the protection of public and private interests against hostile and injurious legislation, and to prevent the appropriation of highways to railroad uses by legislative grant, without consulting the interest of the locality. * * * But the Constitution neither by express language nor by implication abridges the legislative power over the subject outside of the matters particularly enumerated. It needs no citation of authorities to sustain the postulate, that except as restrained by the constitution, the legislative power is untrammelled and supreme, and that a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control. Nothing is subtracted from the

sum of legislative power, except that which is expressly or by necessary implication withdrawn. The legislature is prohibited from granting a franchise to construct a street railroad, except upon certain specified conditions. But it is not prohibited from annexing further conditions not inconsistent therewith, and whether other conditions are necessary or proper, is a matter resting in the wisdom and discretion of the legislature."³⁴

Although street franchise provisions for municipal profit sharing and ownership, unlimited and indefinite privileges, adequate extensions, street paving, rights of forfeiture, the consent of the abutting property owners, etc., are conditions within the exclusive jurisdiction of the local authorities in giving their consent, the author ventures the suggestions that the commission may determine, first, whether the terms and conditions imposed by the local authority harmonize with the several provisions of the state constitution relating to the state's police power; second, whether they are consistent with such general laws of the state as do not contravene the purpose and spirit of the constitutional provisions vesting in the local authorities the exclusive power of giving consent; third, whether they are consistent with the laws of the state under which the applicant was incorporated and by virtue of which it is authorized to do business; fourth, whether the applicant in offering to perform the service has the ability and will furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable; and fifth, whether the public convenience and necessity require the service and the applicant to exercise the right or privilege under the franchise in furnishing it.³⁵

³⁴ Re Thirty-fourth Street R. R. Co., 102 N. Y. 343, 348, 350, 351, 7 N. E. 172.

³⁵ Re Kansas City Railways Co., 3 Mo. Public Service Com. Rep. 593, 621-624, P. U. R. 1916 E, 544.

"It is a misconception of the law to suppose the railway com-

pany derives its power to construct a railroad from any ordinance of the city. All its authority is from the state and is conferred by its charter." Chicago, etc., Railroad Company v. People, 73 Ill. 541, 548-549.

The state ought not to grant a certificate to proceed to a public utility of any character unless after a hearing it appears clearly that the applicant is financially able to construct, operate and furnish the service. For if not, the public of the community will be harmed and not helped, and thus one object of this requirement would be defeated.³⁶

§ 1642b. Review of franchise ordinance.³⁷

VI. CONTENTS, CONDITIONS, ACCEPTANCE, CONSTRUCTION AND ASSIGNMENT.

§ 1644. Imposing conditions on granting franchises.³⁸

³⁶ "A transportation company which faces certain bankruptcy the moment it starts cannot properly serve the public. Reasonable property is necessary to reasonable service. Such a corporation only cumburs the ground and prevents another corporation from occupying the same field and giving proper service. In its eagerness to build, a transportatiin corporation might agree to pay such a high price for the franchise and stipulate to carry passengers at such a low fare, that it would be perfectly manifest that it could never operate at a profit." *People ex rel. v. Willeox*, 133 App. Div. 564.

"The law requiring the granting of a certificate of public convenience and necessity was enacted for the purpose of preventing the construction of bankrupt roads and for the prevention of the evils which would follow from such construction. If it is clearly apparent that a road will be bankrupt from the outset the granting of a certificate of public convenience and necessity would be a direct violation of the spirit and purpose of

the statute which should not be tolerated." *Re Buffalo Rochester & Eastern R. R.*, 3 N. Y. P. S. C. 55, 93, 94, 113, 114; Same case, 1 N. Y. P. S. C. 605 to 612.

³⁷ By state Public Utilities Commission. *Humphreys v. Pratt City Comrs.*, 93 Kan. 413, 144 Pac. 195.

Section 185, ante; § 1642A, ante.

³⁸ § 185 ante; § 1642A, ante. May impose conditions which are not arbitrary or oppressive or such as to work injustice and impose burdens upon the people or deprive them of rights to which they would otherwise be entitled. Condition in franchise to gas company that it should not supply gas for lighting in competition with the city was not enforced where the city permitted citizens not reached by its pipes to use gas supplied by the company for lighting and was not itself manufacturing gas which was reasonably fit for lighting purposes. *Wheeling v. Natural Gas Co. of West Virginia*, 74 W. Va. 372, 82 S. E. 345.

Although there exists an ordinance of general application regulating the use of streets, a

§ 1645. Same—requiring compensation for use of streets.³⁹

municipality may impose other special conditions in granting a license to a particular public service corporation, and it is not required to grant privileges to all public service corporations on the same terms. Where by a condition in grant of its franchise a telephone company was to give the city free telephone service as a consideration for use of streets, it was held the city could not demand any further remuneration, and hence, an ordinance fixing a rental charge for every pole erected by a telephone company in the streets did not apply to it. *Springfield v. Inter State Tel. Co.*, 279 Ill. 324, 116 N. E. 631, affirming 201 Ill. 227.

Under a statute conferring power to grant franchises without limitations on the manner of doing so a city is invested with wide discretion to do such incidental things as are reasonably in its interest and may require the company to pay a certain per cent of its receipts to the city. *Federal Gas & Fuel Co. v. Columbus*, 96 Ohio 530, 118 N. E. 103.

Where a city has power to grant a franchise for construction of lines for transmitting electric current it may impose condition that grantee shall not furnish electricity for lighting. *Old Colony Trust Co. v. Tacoma*, 230 Fed. 389, 144 C. C. A. 531, affirming 219 Fed. 775.

The power of the local authorities to impose as a condition to giving consent to the construction and operation of a street railroad that a stipulated rate of fare should be charged has been repeat-

edly upheld. *Quinby v. Public Service Com.*, 223 N. Y. 244, 259, 119 N. E. 433; *Allegheny v. Millville, Etna & S. St. Ry. Co.*, 159 Pa. 411, 28 Atl. 202.

Power to municipalities to consent to the construction and operation of a street railway, the location of tracks, and to impose lawful restrictions, a condition as to rates in the assent of the city while binding on the city and the company will not restrict the power of the state to fix rates. *Atlantic Coast Electric Ry. Co. v. Board of Public Utilities Comms.*, 92 N. J. L. 168, 104 Atl. 218. See § 1737, post.

In franchise to supply light that light for certain purposes be furnished free to the city. *Terrell v. Terrell Electric Light Co.* (Tex. Civ. App.), 187 S. W. 966.

³⁹ Acceptance by telegraph company of federal legislation granting right to erect poles and string wires in streets does not deprive a city of the right to charge telegraph company a reasonable compensation for the use of its streets. *Postal Telegraph Co. v. Newport*, 160 Ky. 244, 169 S. W. 700.

City officers having authority to regulate the laying of gas mains, can impose reasonable condition as a fee for inspection. *New York v. Woodhaven Gaslight Co.*, 160 N. Y. S. 12, 96 Misc. Rep. 52.

Where constitutional grant to use streets is expressly made subject to direction by municipal authorities who have control over streets, city may require that permit be obtained before any ex-

§ 1646. Same—requiring plant or road to be completed within fixed time.⁴⁰

§ 1649. Same—construction and effect of conditions.⁴¹

§ 1650. Acceptance of franchise.⁴²

§ 1652. Construction of franchises.⁴³

The general rule prevails that franchises are to be con-

cavation is made in a street and that a deposit be made to cover cost of inspection, restoring street to original condition and any other damages that may arise. *Re Keppelmann*, 166 Cal. 770, 138 Pac. 346.

⁴⁰ If the legislature confers on a public utility the right to occupy streets of a city upon the conditions that the consent of such town be first obtained, the city in giving its consent cannot attach as a condition subsequent that upon failure of the company to exercise the right to occupy the streets within one year, the right shall be forfeited. *Galveston & W. Ry. Co. v. Galveston* (Tex. Civ. App.), 155 S. W. 273.

⁴¹ One who accepts the grant of a right to use streets is bound by conditions imposed by grant, or if he refuses to accept conditions, no right is granted. *Le Blanc v. New Orleans*, 138 La. 243, 70 So. 212.

⁴² Franchise does not become operative until the grantee has accepted. The term "grant" implies offer of the city and acceptance by the company, for the municipality cannot fashion a grant and compel anyone to accept it. *Portland v. Public Service Comm.*, 89 Or. 325, 173 Pac. 1178.

⁴³ *Norman Milling & Grain Co. v. Bethurem*, 41 Okla. 735, 740, 139 Pac. 830, citing § 1652, p. 3473, vol. 4, ante.

A provision in a twenty years' franchise to a light company that the city may purchase the plant of the company within that time does not raise a presumption that the city cannot construct or acquire a plant in any other way during that time. The exclusion of the city from competition with the grantee of a franchise will not be presumed, where not expressly provided, from the fact that the franchise would be valueless unless the city was so excluded. *Memphis S. H. & P. Co. v. Memphis*, 271 Mo. 488, 196 S. W. 1113.

In an action to enjoin a company whose franchise had expired from operating its street cars and to compel it to remove its tracks, it was held the city might compel the company to remove its property from the streets after the expiration of its franchise, but must allow a reasonable time therefor, and that the city could not compel the company to accept its terms for continued occupation of the streets. *Detroit v. Detroit United Ry. Co.*, 172 Mich. 136, 137 N. W. 645.

In an action to enjoin a public

strued in harmony with the constitution and laws, when this can be done.⁴⁴

And it is also a general rule that they should be liberally construed in favor of the public,⁴⁵ and against the grantee.⁴⁶

If ambiguity exists usually that construction will be adopted which the parties thereto have placed upon it by their acts.⁴⁷

VII. DURATION, TERMINATION, REVOCATION AND FORFEITURE.

§ 1654. Power of municipality to fix duration of franchise.

Unless restricted a municipality may fix the duration of a franchise at any reasonable length of time but it cannot without statutory authority grant a perpetual franchise.⁴⁸

service commission from raising rates charged by a telephone company holding a franchise from a municipality, it was said that a franchise is never construed to have the effect of granting freedom from regulation by the state in the exercise of its police power, unless the state's grant to the municipality and the municipality's grant in the franchise are expressed in terms positive and clear. *Winfield v. Public Service Comm.* (Ind. 1918), 118 N. E. 531.

⁴⁴ Construction which would place grant in harmony with constitution should be adopted. *Ennis Waterworks v. Ennis*, 105 Tex. 63, 144 S. W. 730, affirming (Tex. Civ. App.), 136 S. W. 513.

⁴⁵ A public grant must be strictly construed against the grantee. Thus a permit to build vault under a public street is not to be construed as conveyance of title to

the space so occupied. *Lincoln Safe Deposit Co. v. New York*, 210 N. Y. 34, 103 N. E. 768, affirming 132 N. Y. S. 1135, 148 App. Div. 895.

⁴⁶ *State ex rel. v. Des Moines City Ry. Co.*, 159 Iowa 259, 274, 140 N. W. 437.

If there is ambiguity in the terms of an ordinance granting a franchise as to the time in which it is to be enjoyed, it will be construed more strictly against the grantee. *Princeton v. Princeton E. L. & P. Co.*, 166 Ky. 730, 179 S. W. 1074.

⁴⁷ *Joplin v. Wheeler*, 173 Mo. App. 590, 608, 158 S. W. 924.

⁴⁸ *Newsom v. Rainier* (Or. 1919), 185 Pac. 296, following *St. Joseph v. St. Joseph Waterworks Co.*, 57 Or. 586, 111 Pac. 864, 112 Pac. 1083; *State v. Des Moines City Ry. Co.*, 159 Iowa 259, 140 N. W. 437.

Municipality (in Kentucky) has

§ 1656. Construction of grant as to duration.⁴⁹

authority to grant a perpetual franchise. A grant by a city of all the "right and authority it has capacity to grant" purports a grant in perpetuity. *Covington v. South Covington & C. St. Ry. Co.*, 246 U. S. 413, 38 S. Ct. 376, 62 L. ed. 802, 2 A. L. R. 1099, with note pp. 1105-1129.

Where a city charter limits the period of time for which a franchise may be granted, a franchise for a longer period cannot be granted, unless the charter is amended, and this is true irrespective of the fact that by statute the city might grant a franchise for a longer period than that fixed in the charter. *California-Oregon Power Co. v. Medford*, 226 Fed. 957.

Grant beyond limit of corporate life of company. *State v. Des Moines City Ry. Co.*, 159 Iowa 259, 306, 307, 140 N. W. 437.

City in granting a franchise for the use of its streets and public ways acts in a sovereign capacity, and in so doing has such powers only as are expressly given or arise by necessary implication. It cannot grant a perpetual franchise to a street railway to use the streets without power duly conferred. *State ex rel. v. Des Moines City Ry. Co.*, 195 Iowa 259, 282, 283, citing with approval § 1654, vol. 4, ante, and considering legislation on the subject.

⁴⁹ Discussion of indeterminate franchises. *State v. Des Moines City Ry. Co.*, 159 Iowa 259, et seq. 301, 140 N. W. 437, 454, citing § 1656, vol. 4, ante.

Construed against grantee

(§ 1652, ante), enjoying exclusive privileges. *Ib.*

Where by statute the streets were "vested in the city" and the authorities of the city were given "exclusive control over the same," and "exclusive power to establish and regulate * * * all sidewalks, streets, alleys, lanes, spaces, and commons of the city," the city may grant a perpetual street railway franchise. "No decision of the state court is brought to our attention that calls for any hesitation in following the authority of *Owensboro v. Cumberland Teleph. & Teleg. Co.*, 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988, and pronouncing the authority complete. *Wolfe v. Covington & L. R. Co.*, 15 B. Mon. 404. A street railroad is one of the incidents of a city street and stands on a different footing from the steam roads habitually run over separate rights of way." *Covington v. South Covington & C. Street R. Co.*, 246 U. S. 413, 418, 38 Sup. Ct. Rep. 376, 62 L. ed. 802, 805, 2 A. L. R. 1099, with dissenting opinion concurred in by two of the justices declaring "an unfortunate extension of the doctrine of the *Owensboro* case (*supra*) and resting upon the "now seemingly neglected doctrine" of *Blair v. Chicago*, 201 U. S. 400, 463, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

A grant of the right to use public streets without a time limit as to the duration of the right, is not perpetual, but is necessarily limited to the life of the corporation granting it or to the life of the corporation obtaining such right.

§ 1658. Rights on termination of franchises.⁵⁰

§ 1660. Surrender of franchise and withdrawal from public employment—duty to render service.

The general governmental and legal principles to be applied as to common carriers are well settled. It is familiar that railroad property is private property devoted to public use, that a railroad is a public highway and that railroad companies are common carriers.⁵¹

A railroad corporation is created for public purposes and performs a function of the state and is under governmental supervision and control. Its charter, franchise, rights and privileges are granted by governmental authority on condition that it will serve the public, and the acceptance of these grants by the company imposes upon it the duty to operate when the road is constructed in the manner and for purposes contemplated by its charter and the laws.⁵² As pointedly expressed in a recent decision of the United States Supreme Court, "The common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities which are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public

Sullivan v. Central Illinois Public Service Co. (Ill. 1919), 122 N. E. 58, 59.

⁵⁰ Rights of grantees of a franchise, terminate at the time fixed by the terms thereof and no further obligation between the city and the grantee can be implied from the franchise. *Detroit v. Detroit United Ry. Co.*, 172 Mich. 136, 137 N. W. 645.

⁵¹ Constitution Missouri 1875, Article XII, § 14.

⁵² *Smyth v. Ames*, 169 U. S. 466, 544; *Union Pacific R. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428, affirming 28 Fed. Cas. No. 16, 601,

4 Dill 479; *Talcott v. Pine Grove*, 1 Flippin (U. S. C. C.) 120, 144; *State v. Hartford & New Haven R. R. Co.*, 29 Conn. 538; *State ex rel. v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320; *Lorraine v. Pittsburgh, etc., Rd. Co.*, 205 Pa. 132, 61, L. R. A. 502, 54 Atl. 580; *Railroad Cons. v. Portland, etc., Rd. Co.*, 63 Me. 269, 18 Am. Rep. 208; *People ex rel. v. St. Louis, etc., Rd. Co.*, 176 Ill. 512, 35 L. R. A. 656, 45 N. E. 824, 52 N. E. 292; *Rowland v. Saline River Ry. Co.*, 119 Ark. 239, 177 S. W. 896, P. U. R. 1915 E, 191, 193, 194.

duties and the state within the limits of its jurisdiction may enforce them.”⁵³

§ 1660a. Same—surrender of lines or branches or parts thereof of roads.

The general proposition whether a railroad or street car company may abandon the operation of its lines or any part or branch thereof, at its pleasure without action or consent by the state or its agent because unprofitable or because public convenience or necessity does not require the service so abandoned has been considered frequently by judicial decisions, legal textwriters, commentators and annotators in the varying phases in which it has been presented. In such discussions expressions and conclusions differ, but these differences for the most part are more apparent than real, due mainly to the differences in the facts and conditions of individual cases or those assumed to exist; and many of the decisions turned upon the construction of the language, whether mandatory or permissive, of the charter, statutes or ordinances which were before the courts; however, some difference is due without doubt to the difference in the fundamental conception of the public obligation of the public service company and the rights of those to be served by it. It is conceded law that if the charter so

⁵³ *Northern Pacific v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, P. U. R. 1915 C, 277.

And as stated in a earlier decision by that court, the elementary proposition that railroad from the public nature of the business by them carried on and the interest which the public have in their operation are subject as to their state business to state regulation which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully ques-

tioned in view of the long line of authority sustaining that doctrine. *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 933, 11 Ann. Cas. 398.

Legislature may consent to the surrender of a franchise granted by a city without the latter's approval. However, there was no surrender of the franchise in the case which grew out of an application to a public service commission for raise in rates. *State v. Lewis (Ind.)*, 120 N. E. 129.

requires the operation of a railroad or street railway may be compelled,⁵⁴ or its operation resumed if it has been abandoned.⁵⁵

However, concerning the board proposition whether under general charter and legislative obligation, apart from specific requirement positively imposed, the railroad or street car company must operate the decisions are not harmonious.⁵⁶ Many decisions rest upon the ground that the property of a railroad or street car company is charged with a public duty and held subject to the trust to execute the objects of its charter.⁵⁷

⁵⁴ *Union Pacific Railroad Co. v. Hall*, 91 U. S. 343.

⁵⁵ *People v. New York Central, etc., Railroad*, 28 Hun. (N. Y.) 543, 3 N. Y. Civ. Pro. 11.

⁵⁶ *Connecticut. State v. Hartford & N. H. R. Co.*, 29 Conn. 538.

Illinois. Peoria & R. I. Rd. Co. v. Coal Valley M. Co., 68 Ill. 489; *People ex rel. v. St. Louis, A. & T. H. R. Co.*, 176 Ill. 512, 45 N. E. 824, 52 N. E. 292, 35 L. R. A. 656.

Kansas. Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312.

Massachusetts. Com. v. Fitchburg R. Co., 12 Gray (78 Mass.) 180.

Maryland. Public Service Com. v. Philadelphia, B. & W. Rd. Co., 122 Md. 438, 89 Atl. 726; *Whalen v. Baltimore & O. Rd. Co.*, 108 Md. 11, 69 Atl. 390, 129 Am. St. Rep. 423, 17 L. R. A. (N. S.) 130; *Montell v. Consolidated Coal Co.*, 45 Md. 16.

New Jersey. Black v. Delaware & R. Canal Co., 22 N. J. Eq. 410.

Nebraska. State v. Sioux City & P. Rd. Co., 7 Neb. 357.

New York. People v. Albany & V. Rd. Co., 24 N. Y. 261, 82 Am.

Dec. 295; *New York v. Dry Dock, E. B. & B. Rd. Co.*, 133 N. Y. 104, 30 N. E. 563, 38 Am. St. Rep. 609.

Ohio. Coe v. Columbus, P. & I. Rd. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Virginia. Southern Ry. Co. v. Franklin & P. Rd. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 298.

Wisconsin. Attorney General v. West Wisconsin Ry. Co., 36 Wis. 466.

United States. Farmers' Loan & T. Co. v. Henning, Fed. Cas. No. 4, 666.

England. Reg. v. Great Western Ry. Co., 62 N. J. Q. B. N. S. 572, 69 L. T. N. S. 572, 9 Reports, 127.

⁵⁷ *Pierce v. Emery*, 32 N. H. 484.

In *Talcott v. Pine Grove Twp.*, 1 Flippin (U. S. C. C.) 120, 145 Fed. Cas. No. 13735, the relation of a railroad company to the public has been thus clearly defined (dictum): "The road once constructed is instant, and by mere force of the grant and law, embodied in the governmental agencies of the state and dedicated to public use. All and singular its cars, engines, rights of ways, and property of

Therefore, the right of a street car company to aban-

every description, real, personal, and mixed, are but a trust fund for the political power, like the functions of a public office. The judicial personage, the corporation created by the sovereign power expressly for this sole purpose and no other, is, in the most strict, technical and unqualified sense, but its trustee. This is the primary and sole legal, political motive for its creation. The incidental interest and profits of individuals are accidents, both in theory and practice. Every farthing of its tolls is first to be devoted to paying the public tax, and to the continuance of the road, its ample equipment and regular operation as the interests of the community, not those of shareholders, demand. No matter that a dividend is never paid, that the private investment is sunk and worthless, that the interest upon its bonds is not met, and that all its creditors go unpaid, every dollar of its earnings must nevertheless be applied to keep up its maximum efficiency, as required by the political power in the law which created it. The neglect of the smallest of these duties in which the community is interested will be enforced by the public writ of mandamus and in Michigan by various statutory proceedings at the suit of the attorney-general. This law officer of the state is especially charged by statute with the duty of enforcing them. That a railroad cannot be abandoned after it has become one of the thoroughfares of the country, and

that the company will, by proceedings in behalf of the state, be forced to continue its road and perform all its duties to the public, is beyond question."

In *Gates v. Boston & N. Y. Air Line Rd. Co.*, 53 Conn. 333, 342, 5 Atl. 695, 699, 700, the carrier's obligations to operate and serve the public are thus well stated (*dictum*): "It is true that the charter is permissive in its terms, and probably no obligation rests upon the corporation to construct the railroad; the option to exercise the right of eminent domain and other public rights is granted. And when that option has been made, and the corporation has located and constructed its line of track, exercising the power of the state in taking property of others, and, in so locating and constructing its road, has invited and obtained subscriptions upon the implied promise to construct and operate its road, has commenced to operate the road under the granted powers, thereby inducing the public to rely, in their personal and business relations upon that state of affairs; by so accepting and acting upon the chartered powers a contract exists to carry into full effect the objects of the charter and the capital stock, franchises, and property of the corporation stand charged primarily with this trust. The large sovereign powers given by the state to railroad corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Hav-

don its route on specified streets and public ways, at its mere pleasure, without the sanction of the state has been denied often.⁵⁸

ing exercised those powers, the corporation has no right, against the will of the state, to abandon the enterprise, tear up its track, and sell its rolling stock and other property, and divide the proceeds among the stockholders. The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the state, certain destruction of private property, in which whole communities, created and existing upon the faith of the continuous use of the chartered powers, are interested, and indeed, the life of the citizen as well as his property rights, are thus jeopardized. Upon principle it would seem plain that railroad property, once devoted and essential to public use, must remain pledged to that use, so as to carry to full completion the purpose of its creation; and that this public right, existing by reason of the public exigency, demanded by the occasion, and created by the exercise of a private person of the powers of a state, is superior to the property rights of corporations, stockholders and bondholders. To this effect, also, is the weight of authority. (Citing a number of cases.)

* * *

"The American and English cases which seemingly doubt these propositions place their conclusions upon the construction of the particular chartered powers and obligations. * * * The necessary conclusion is that the state

has a right to enforce the continuous exercise of the corporate powers and franchises for public use, to the exhaustion of the value of such property and franchises; and this is true no matter what private right may embrace the title of the property."

⁵⁸ *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, 70 N. E. 213; *Thompson v. Schenectady Ry. Co.*, 65 C. C. A. 325, 131 Fed. 577.

In *State ex rel. v. Bridgeton & M. Traction Co.*, 62 N. J. L. 592, 43 Atl. 712, 45 L. R. A. 837, the street railway was incorporated under the state laws, and the route of its road and the location of its tracks were established by municipal ordinances which had been accepted by the company, and the road had been constructed and put into operation. Here it was held that the company could not, at its mere will and discretion, cease and abandon the operation of any portion of its lines. The court said: "The grant being exclusive they must be held to a good faith in the performance and fulfillment of their duties. I cannot perceive any excuse whatever by which the respondent company can be permitted to abandon the operation of any part of it. That a portion is unprofitable, or that a portion is more difficult to operate, are not valid reasons for abandonment. Its application to the city was for the location of its tracks over the whole route. * * * It appears clear from the

In the absence of special requirements imposed by charter, franchise, grant or statute these public duties are sometimes regarded as no greater than the public interests demand and justify.⁵⁹

statute and the ordinance that it is the duty of such company organized under the statutes to operate the roads mentioned in its certificate of incorporation for the benefit of the public, in consideration that it shall have the franchise of transporting the passengers and taking the tolls from them, and it cannot escape the performance of this duty as a public agent."

A like ruling was announced in *Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312, under facts quite similar.

In *State ex rel. v. Spokane Street Ry. Co.*, 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515 (a similar case), the public function of the carrier is expressed thus: "It is not in degrees only that these franchises differ from mills and inns. The one is private property, the other is a public function, which originally resided in the government, and, when delegated to either person or corporation, still retain the public use." Concluding after an elaborate discussion of the principles involved: "We conclude that a corporation of the nature of appellant, receiving its franchises from the state and entering upon the enjoyment of them, cannot cease to perform the functions which were the consideration for the grant of such franchises with-

out the consent of the granting power."

⁵⁹ See *Hannibal v. Hannibal Ry. & El. Co.*, 2 Mo. P. S. C. 619, 631, 632.

In *State ex rel. v. Dodge City M. & T. Ry. Co.*, 53 Kan. 377, 378, 36 Pac. 747, 42 Am. St. Rep. 295, 24 L. R. A. 564, 568, in granting an injunction to restrain the removal of railroad tracks, on a part of the road which had been operated, wherein the unprofitableness of the enterprise was adjudged not to be controlling, it was said: "The right to exercise the very high attributes of sovereignty, the power of eminent domain and of taxation, to further the construction of railways, could not be granted to aid a purely private enterprise. The railway corporation takes its franchises subject to the burden of a duty to the public to carry out the purposes of the charter. The road, when constructed, becomes a public instrumentality, and the roadbed, superstructure and other permanent property of the corporation are devoted to the public use. From this use neither the corporation itself, nor any person, company or corporation deriving its title by purchase, either at voluntary or judicial sale, can divert it without the consent of the state. It matters not whether the enterprise as an investment be profitable or unprofitable, the property may

These duties are said to be merely "to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains this is sufficient evidence that the public does not require it to be kept in operation; and in such case the company may cease operating the road unless this be contrary to the express terms of its charter." ⁶⁰

not be destroyed without the sanction of that authority which brought it into existence. Without legislative sanction railroads could not be constructed. When once constructed, they may only be destroyed with the sanction of the state. The legislature unquestionably has the power to authorize the abandonment of all railroads when they cease to be of public utility. It may be, also, that in an action prosecuted by the attorney-general, on behalf of the state, to forfeit the charter and wind up the affairs of a railroad corporation for any proper cause, the court might make all necessary orders for the disposition of the property of the company; but in this case the state appeared by the county attorney of the county in which the road was located protesting against the removal of the superstructure of the road. The court erred in refusing the injunction asked. The general propositions above stated are abundantly supported by authority." (Citing a large number of adjudicated cases.)

⁶⁰ Morawetz, Corp. Section 1119.

"If the line of road is not capable, under any management, of being self-sustaining, it simply shows that there is no demand or necessity for the road and the sooner,

therefore, the state revokes the franchise the better. A business that will not pay ought not to be followed, as it adds nothing to the wealth of those pursuing it or of the state." *Ohio & M. Ry. v. People*, 120 Ill. 200, 208, 11 N. E. 347, 350.

Where it was found that the road could not operate except at a great loss and a part of the tracks had been torn up the court refused to order the tracks replaced when there was "no reasonable probability that the road will be or can be operated. If a railway will not pay its mere operating expenses, then the public has little interest in the operation of the road or its being kept in repair." *State ex rel. v. Dodge City M. & T. R. Co.*, 53 Kans. 329, 336, 36 Pac. 755, 42 Am. St. Rep. 295, 24 L. R. A. 564, 568.

"It is clear that the duty required is not more than to meet and supply the public wants. These are measured by the business actually done, or what could be clearly shown would be done, if increased facilities were granted. There is nothing in the language of the statutes requiring, nor can any just implication from the powers and privileges conferred upon the corporation require, that trains for passengers or freight

Thus it was held that a carrier may be permitted to abandon a branch line which is not self-supporting, is in a dilapidated condition, and for the continued operation of which "there is little public necessity," where the road is insolvent with no means of obtaining the money for rehabilitating the branch, the operation of which in its present condition is dangerous, while its attempted operation jeopardizes the successful operation of the remainder of the system for which there is public need. "In such circumstances," said the court, "the railroad company may abandon such unprofitable and irreclaimable part of its road, and neither the state nor unfortunate investors along the line can justly complain. They cannot force a railroad company to do the impossible."⁶¹

Where a street railway company has only the right or license to lay down its tracks and operate its cars thereon in the public streets until revoked or terminated by the municipal authorities, in the absence of statutory or contractual provision, it may discontinue operation of a branch line which is not an integral part of its main system and which has not sufficient patronage to meet its running expenses; and mandamus to compel the restoration of the service will not lie. Although as pointed out by the court, the street railway company is a quasi-public corporation, organized for the exercise of an important public franchise for the benefit of the public and not merely for its own profit, it has not, like steam railroads an exclusive control and a vested right of property in the soil upon which its tracks are laid. "And as a bare license may at any time be revoked or termi-

should be provided, which are not wanted, or which the business on the road would utterly fail to support. * * *

"It would seem to be, therefore, not only its right, but its duty, to exercise a sound discretion in the use of its capital, lest by exhausting it upon trains that were not

required by the public wants, it should deprive itself of the means of running at reasonable rates those that were." *Commonwealth v. Fitchburg*, 12 Gray (78 Mass.) 180, 188-190.

⁶¹ *State v. Old Colony Trust Company*, 215 Fed. 307, 133 C. C. A. 581, L. R. A. 1915 A, 549, 561.

nated by the licensor, so the licensee is at liberty at any time to cease wholly to avail himself of the permission given and to discontinue his action thereunder, unless there has been some agreement to the contrary."⁶²

In a somewhat similar case it was held that, if the street railway company's charter does not in express terms or by fair implication forbid, the company may discontinue operation of a portion of its line which had been built under a mere privilege to construct and operate it, and that mandamus would not lie to compel restoration of service thereon.⁶³

If power is simply conferred to construct a branch road but its construction is not made obligatory the company cannot be compelled to construct such branch, or having constructed it to maintain and operate it to the prejudice and the rights and interests of the company.⁶⁴

Although when a road is constructed ordinarily a railroad company may not voluntarily abandon a line or cease

⁶² *Stiles v. Citizens' El. St. Ry. Co.*, 199 Mass. 294, 85 N. E. 419, 19 L. R. A. (N. S.) 864, 866, 869.

⁶³ *San Antonio St. Ry. Co. v. State*, 90 Tex. 520, 39, S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

A like case is *State ex rel. v. Helena P. & L. Co.*, 22 Mont. 391, 56 Pac. 685, 44 L. R. A. 692.

⁶⁴ *Sherwood v. Atlantic & Danville Ry. Co.*, 94 Va. 291, 26 S. E. 943.

"If, as in *Union Pac. Rd. v. Hall*, 91 U. S. 344, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tidewater (as was held to be the case in *State v. Hartford &*

M. H. R. R., 29 Conn. 538) and it has so constructed its road and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. (*New Orleans M. & T. R. Co. v. Mississippi*, 112 U. S. 12, 5 Sup. Ct. Rep. 19, 28 L. ed. 619; *People ex rel. v. Boston & A. R. Co.*, 70 N. Y. 569.) But if the charter of a railroad corporation simply authorizes the corporation, without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point when it would not be remunerative." *Northern P. R. Co. v. Dustin*, 142 U. S. 492, 499, 12 Sup. Ct. Rep. 283, 35 L. ed. 1092, 1095.

to operate any portion of its road and may be compelled to resume operation, where it distinctly appears that there is not sufficient traffic to pay expenses, usually the company will not be required to operate at a loss. Moreover, it has been held that in the absence of charter or statutory obligation, the company may abandon operation of a road that cannot be operated except at a loss.⁶⁵

But whether in the absence of charter or statutory duty, the operation of an unprofitable road or a portion thereof may be compelled depends on the particular circumstances of the case.⁶⁶

⁶⁵ *Jack v. Williams*, 113 Fed. 823, affirmed in 145 Fed. 281, 76 C. C. A. 165, distinguishing *State v. Sioux City and P. Railway Co.*, 7 Neb. 357; *People v. Albany and V. Rd. Co.*, 24 N. Y. 261, 82 Am. Dec. 295.

⁶⁶ The question is thus discussed in a Virginia case: "It may be asked is a corporation having constructed a road to be permitted to abandon its use at its pleasure? We answer that it is not to be apprehended that the corporation will abandon any part of its line, the operation of which is found remunerative in the present, or that is like to become so in the future. Where the line of railway taken as a whole cannot be profitably maintained; where its operation when discreetly and economically managed is attended with loss, it is difficult to perceive how a court can, by mandamus or otherwise, compel its operation to be continued. If the loss is the result of improvident and unthrifty management, the court may at the suit of those interested take charge of it for the benefit of all concerned and run it through the in-

strumentality of a receiver, but if the traffic of the road is really insufficient to support a wise and economical administration of its affairs, there would seem to be no escape from its ultimate abandonment. Such cases are possible though rare. It more frequently happens, however, that a part of a line becomes unprofitable though the system as a whole may be valuable. In such an event the court will inquire, first, as to the positive duties imposed by the charter, and compel their performance by appropriate remedies, while with respect to those duties which were not imposed by the charter, but which have been assumed by the corporation under permissive grants of power it will consider all the circumstances of the case and if upon the facts it shall appear that the duty unfulfilled inflicts no particular injury or hardship upon those who make the complaint, and that the service which they receive is under all the conditions reasonably adapted to their needs, while the performance of the duty would entail a burden and loss upon the company far in

If as a result of consolidation, a carrier secures the control of two lines of railroad, it may abandon one of them where it appears that the line retained will substantially serve the public, and the line abandoned can be operated only at great expense and little profit.⁶⁷ For like reason one of two parallel roads may be abandoned where the remaining one will serve the public adequately.⁶⁸

§ 1660b. Same—author's conclusions.

Notwithstanding the apparent conflict in the judicial judgments on this subject there is substantial agreement on these propositions: First, a public service corporation, as a railroad or street car company, may always be required to perform its public duties, evidenced by its charter and the law, although in so doing it may suffer some incidental loss;⁶⁹ second, when a railroad or street railway is once constructed its operation may be abandoned only by sanction of the state;⁷⁰ third, that after construction a fair and reasonable trial must be had and it should prove futile before the operation of a railroad, street railway or branch thereof can be abandoned; fourth, where public aid has been given through taxation and donations of labor and materials, so long

excess of any benefit conferred, and which might in its ultimate effect embarrass and prevent the performance of other duties with respect to large interest, and affecting a far greater number of citizens, the court will withhold its hands." *Sherwood v. Atlantic & D. R. Co.*, 94 Va. 291, 306, 307, 26 S. E. 943.

A note in *Lawyer's Reports*, annotated, 1915 A, 549 (Vol. 53, N. S.), states: "The general rule seems to be that a railroad cannot abandon its road or a branch, even though it may be operated at a loss, and cases which are appar-

ently in conflict with this rule will be found to have turned on special circumstances that warranted the decision."

⁶⁷ *People v. Rome, W. & O. Rd. Co.*, 103 N. Y. 95, 8 N. E. 369.

⁶⁸ *Day v. Tacoma R. & P. Co.*, 80 Wash. 161, 141 Pac. 347.

⁶⁹ See *Missouri Pacific R. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. ed. 472.

§ 1660 A, ante.

⁷⁰ See *Kansas City Interurban Ry. Co. v. Davis*, 197 Mo. 669, 676; *St. Louis v. St. Louis Gas-Light Co.*, 5 Mo. App. 484, 529, 530.

as such benefits are retained by the carrier it is under obligations to operate the property and serve the public, because in such situation "it assumes a relation to the public of a higher and more sacred character than a mere contract between private individuals. It would be at war with every principle of natural justice to hold that it might avail itself of this public aid, and then violate its obligation to the public incurred by reason of the aid thus received."⁷¹

As long as public franchises are exercised, public service must be rendered. In practice it is probable that abandonment would occur or be desired only where the operation entails a continuous financial loss. A profitable road would hardly be abandoned. If its owners wish to rid themselves of the burden of operation of paying railroad property, purchasers may readily be found, except perhaps when business depression prevails. If the road cannot be operated profitably, the question arises, would it subserve the public use for the state to compel its owners to operate at a loss? Or, if the duty of a railroad or street car company is to be measured by the public wants and trains both freight and passenger are run on its line at reasonable and moderate fares and proper transportation service is thus provided, but cannot be maintained without a constant financial loss, the inquiry is invited, is such service needed by the public?

If there is public necessity for the operation of the line or branch the right to cease the operation thereof does not exist independent of statute.⁷²

If there exists a public necessity to operate, the obligation to do so is included in the carrier's public duty and the requirement may be compelled since this is within the reasonable exercise of the state's protective power.⁷³

⁷¹ State v. Central Iowa Ry. Co., 71 Iowa 410, 416, 32 N. W. 409, 60 Am. Rep. 806. See State v. Des Moines & Ft. Dodge Ry. Co., 84 Iowa 419, 428-433, 51 N. W. 38; Flint & P. M. Rd. Co. v. Rich, 91

Mich. 293, 51 N. W. 1001; Farmers Loan & T. Co. v. Henning, Fed. Cas. No. 4,666.

⁷² Rib River case, 1 Wis. R. C. R., 739, 754, and cases cited.

⁷³ Northern Pacific Railway v.

If, on the other hand, no public necessity appears, the obligation is not incident to or within the carrier's public duty and a judgment or order to require operation is not authorized.⁷⁴ If then the duty to operate is no greater than the public interest demand and justify, would it be just or reasonable to direct operation where the traffic available for transportation is insufficient to pay expenses? Would such action promote the public welfare? Would it harmonize with provisions of our federal and state organic laws touching rights of property? As the law enjoins, a railroad or street car company owes a duty to the public to exercise the franchise granted to it, and it cannot at its mere pleasure abandon a branch or portion of its road, although such act might incur a forfeiture of its entire charter. The franchise to operate its lines is to be treated as a whole; it is generally so accepted, and it is not within the province of the public service corporation to reject it in part. Where a branch line has been constructed and operated it would seem that the public had an interest in its continued operation unless it should distinctly appear that the cost of maintenance and operation would be so great in comparison with the public benefits derived therefrom that it would be unreasonable to ask a continuance of such operation. Merely building a road without operation of it, of course, is of no value whatever to those who desire service of transportation.⁷⁵

North Dakota, 236 U. S. 585, 35 Sup. Ct. Rep. 429, P. U. R. 1915 C, 217.

⁷⁴ For example, the carrier cannot be compelled to build mere private connections, and the adequacy of the receipts from its entire business, as stated by the Supreme Court of the United States, does not enter into the question. *Missouri Pacific Railroad v. Nebraska*, 217 U. S. 196, 207, 30 Sup. Ct. R. 461, 54 L. ed. 726.

⁷⁵ It cannot be that the railroad

company obtains everything and the public nothing from the original charter. If a railroad company can occupy a portion of the public streets and highways and thereafter construct under its original grant the remaining portion, it is difficult to understand why the public cannot insist on its constructing and operating its road to the full extent of its grant. If a railroad can thus abandon some portion of its route and resume the use of its franchise at will it

In an Arkansas case, the defendant corporation was organized for the purpose of constructing, maintaining and operating a railroad for the conveyance of persons and property. The court said: "The charter confers upon the incorporators the power to operate the road over a fixed line or lines, and it cannot abandon a part of its line and continue to operate the balance under its charter. Its obligation to discharge the duties imposed by its charter must be construed in connection with the nature and productiveness of the corporate business as a whole, the character of the service required, and the public need of its performance. For that reason its statutory duty to operate its road may be compelled, although by doing so as an incident some pecuniary loss may result from rendering such service."⁸⁰ This case also holds that the mere fact that an order requiring operation may

might easily defeat any new franchise in a public street or highway while not using its own, unless some power exists to compel it to exercise its franchise by building and operating its abandoned route. The obligation must be reciprocal and the state must have power to compel the company to exercise its franchise. "The state * * * has no other adequate remedy (than mandamus). It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations had neglected public duties, * * * but that remedy is not adequate, for it only destroys functions where the public interest requires their continued existence and enforcement. It has there an election which of these two remedies to pursue." *People v. N. Y. S. & H. R. R. Co.*, 28 Hun. (N. Y.) 543. A duty to the public requires a full performance of its franchise, and this is a duty

required by law. The violation of the law upon which the Public Service Commission may act is not restricted to such offenses as are specifically mentioned in the written law (*Willeox v. Richmond L. & R. R. Co.*, 142 App. Div. 44, 202 N. Y. 515), but by the express language of section 57 includes the failure or omission "to do anything required of it by law." Although at the time the franchise was granted there existed no board or officer expressly charged with the supervision of the grant of a franchise to compel it to perform the obligations it assumed, the power of the legislature to create such a board and give it such power cannot be successfully questioned." *Public Service Commission v. New York R. R. Co.*, 77 Misc. N. Y. 487, 490 to 493.

⁸⁰ *Rowland v. Saline River Co.*, 119 Ark. 239, 177 S. W. 896, P. U. R. 1915 E, 191, 194.

cause pecuniary loss is not of itself sufficient to render the order arbitrary and unreasonable, but it is a circumstance to be considered, and that an order compelling operation should only be granted in the interest of the public. A vain and futile order should not be issued. Such action would be arbitrary and unreasonable. The question of the reasonableness of the order, of course, is for decision of the court.⁸¹

Generally the question of loss must be considered in connection with the carriers' duty and the productiveness of its corporate business as a whole. The law imposes upon it the duty of furnishing adequate facilities to the public on its entire system, not a part, and it cannot be excused from performing its full duty merely because by ceasing to operate a part of its system the net returns would be increased.⁸²

⁸¹ Since railroads are constructed for public use and the public has rights in them which should be protected, railroad corporations are not authorized to abandon their rights and surrender their charters without the consent of the state. *Freeo Valley Railroad Co. v. Hodges*, 105 Ark. 314, 151 S. W. 281; *Rowland v. Saline River Railroad Co.*, 119 Ark. 239, 177 S. W. 896, P. U. R. 1915 E, 191, 196, 197.

Abandonment of a particular line of street railways should not be permitted merely because for the time being it is operated at a loss. *Re Empire United Railways* (New York P. S. C., 2nd Dist.), P. U. R. 1915 E, 263.

Although loss results in operating a line or branch, if the entire system may be operated at a profit, there is no confiscation of property or deprivation of property rights. *Puget Sound Traction, L. & P. Co. v. Reynolds*, 223 Fed. 376.

⁸² *Colorado & S. Ry. Co. v. State*

Rd. Com., 54 Colo. 64, 129 Pac. 506. See *Brownell v. Old Colony Rd. Co.*, 164 Mass. 29, 41 N. E. 107, 49 Am. St. Rep. 442, 29 L. R. A. 169.

In *St. Louis & San Francisco Railway Company v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567, the legislature of the State of Arkansas had prescribed a maximum rate of three cents per mile for each passenger carried by the railroads of that state, and imposed a penalty of \$300 for each overcharge, payable to the passenger from whom the overcharge was exacted. In an action to recover this penalty the railway company defended on the ground that that portion of the railroad over which the plaintiff was carried was highly expensive to construct and maintain, and that the cost of transporting passengers over the same and the maintenance thereof exceeded the maximum rate fixed by law. Proof was offered tending to show: That "the actual cost

Acceptance of the principle and its free application

of carrying each passenger over that portion of defendant's railway in plaintiff's petition mentioned, and over all its railway therein referred to, did and does now exceed the sum of three cents per mile for each and every passenger so carried," and that "three cents per mile for the service rendered by defendant in carrying passengers, at the times in plaintiff's petition mentioned, over the line of railroad therein described, was not reasonable compensation, and that no less than five cents per mile would be a reasonable sum."

In disposing of this defense and offer of proof the court said: "It therefore appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway, and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor at-

tack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas."

In *Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585, 600, 35 Sup. Ct. 429, a more recent case, Mr. Justice Hughes said: "In *St. Louis & San Francisco Railway Co. v. Gill*, 156 U. S. 649 (15 Sup. Ct. 484, 39 L. ed. 567), a statute, fixing a maximum rate for passengers in the state of Arkansas was challenged, but the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division, of the railroad, and not the the result of all the traffic to which the rate in question applied. The holding that this was insufficient was in entire accord with the above-stated principle—that the rate-making power may be exercised in a practical way, and that the legislature is not bound to assure a net profit from 'every mile, section or other part into which the road might be divided,' 156 U. S. 665 (15 Sup. Ct. 484, 39

that the carrier may abandon any line, branch or section of a road whenever it is shown that the operation of such branch treated as a separate and distinct entity is unprofitable, simply means that in this manner any line, branch or section of the system may be withdrawn from time to time and the public service on the entire system be thereby ultimately completely abandoned, and the carrier's interest only considered irrespective of the public convenience or necessity.

The rights of the carrier and those to be served go hand in hand. The carrier must receive a fair reward and the public must have reasonable service at reasonable charges without discrimination. These requirements are essential to better existence of both the carrier and the public to be served, and that which is necessary to promote public and social life, the state has never allowed to be controlled from the stand point of private interest alone.⁸³

If the line or branch sought to be withdrawn is operating at a loss, obviously it must be made to pay, if at all, from profits on another part or parts of the system. Although it may appear that such branch or line will not pay, treated as a separate entity, and that it will be merely a source of expense to maintain and operate it at the time it is sought to be withdrawn, this is not decisive since such branch or line must be regarded as a integral part of the entire system, and ordinarily the system must be operated as a whole and where the public necessity demands the service no part thereof may be abandoned for the reason alone that it is not fairly remunerative, at least so long as the operating revenues of the entire system are adequate to meet all requirements, unless, as above mentioned, it should appear that the cost of the operation of the branch or line sought to be abandoned would be so great in comparison with the public benefit

L. ed. 567). A passenger rate may apply generally throughout the state, and the effect of the rate must be considered with respect to

the whole business governed by the rate."

⁸³ The devotion of the property of the carrier to public use is

derived from it, it would be wholly arbitrary or unreasonable to require a continuance of operation.

§ 1660c. Same—trial operation of road or part sought to be abandoned.

After construction, as mentioned, a fair and reasonable trial must be had and it should prove futile before operation of a railroad, street railway, or branch thereof, can be abandoned. The carrier's obligation is to make a bona fide trial of operation, since it can not presume in advance that the operation will result in a loss or unfair returns to the entire system. If after a fair trial should be made for a reasonable period and it should be ascertained that operating expenses can not be made, and that the losses resulting from such attempt were so great as to impair the profits on the entire system to such an extent as to prevent or hamper the carrier from maintaining adequate service on the rest of its system, application to be relieved may be made to the proper authorities.⁸⁴

If, therefore, it should occur that the railway system could not earn sufficient revenue to pay the cost of operation and maintenance because the line, branch or section sought to be abandoned could not be operated except at a loss more than counter-balancing the profits on the rest of the system, and the carrier should then be allowed to cease operation of the unprofitable line, branch or section in order to maintain service upon the remainder of its system, it follows that those served by the carrier other than those on the line, branch or section would be benefited, whereas the public on the line, branch or section would suffer from failure of the state to compel the performance of the legal obligation resting on the carrier to

qualified by the condition of the carrier's undertaking; that its services are to be performed for reasonable reward. *Norfolk & Western Ry. Co. v. W. Virginia*, 236 U. S. 605, 35 Sup. Ct. 437, P. U. R. 1915 C, 293, 295.

⁸⁴ *Commonwealth v. Fitchburg*, 12 Gray (78 Mass.) 180, 190; *Smith v. Atlantic S. R. Co.* (Iowa Railroad Commission), P. U. R. 1915 F, 124, 148.

operate every part of its system. The patrons on the line, branch or section would be deprived of the transportation convenience because their limited patronage would not justify the expenditure of the cost of operation. In such situation they could not complain. It is needless to say that if the carrier is required to operate its entire system at a loss this would result in a final abandonment of all service on its system and a forfeiture of its franchise.

§ 1664. Forfeiture of franchise—grounds.

Long continued nonuser of a franchise for public lighting will work a forfeiture thereof to the state and constitute a sufficient ground for a judgment of ouster.⁸⁵

⁸⁵ "There can be no doubt that the underlying purpose of conferring upon the municipality the power to grant the franchise was the prospective service to be rendered to the public, and the benefit to the city in the receipt of its proportional part of the earnings of the grantees as agreed upon by the acceptance of the ordinance. The rendition of such service and the payment of the amount agreed upon was an implied condition of the grant. (State ex rel. v. East Fifth Railway Co., 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742; State ex inf. v. Equitable Loan & Investment Co., 142 Mo. 325, 41 S. W. 916; State ex inf. v. Delmar Jockey Club, 200 Mo. 34, S. W.; Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W. 552.) It was only upon the condition of the exercise of the franchise that the city was clothed with the power to grant it. The privilege granted was one to be used for the public good, and not a talent to be hidden in the earth. The mischief

to be remedied by the amendment was doubtless the large number of such franchises being accepted and outstanding, without the city or the public receiving anything in return. Being possessed of full power under ordinance 12723 to withdraw all of said outstanding franchises and to require thereafter an express legislative consent, why should the city have been solicitous to except from the scope of the amendment those who had rendered no service nor incurred any expense pursuant to their acceptance of the original ordinance? In the case of State of Missouri ex rel. City of St. Louis v. Light and Development Co. of St. Louis, 246 Mo. 618, 152 S. W. 67, this court, in an opinion by Ferriss, J., construing the same ordinance now under review, held that a compliance with ordinance 12723 required the rendition of service to the public under such franchise, as an implied condition of the grant, and that in default of such service there was not a compliance there-

A franchise authorizing the grantee thereof to place wires, tubes and cables conveying electricity for the production of light or power along the streets, alleys and public places of a city means that such grantee agrees to use the privilege for the public benefit. On such implied condition only has the city the right to make such grant. Where the grantee by continued long nonuser fails for a long period of time to observe such implied obligation, his rights to use the streets and public places are lost. In such case mere intention to resume possibly the use at some uncertain future day cannot save the forfeiture. Service to the public is of the essence of the contract which arose upon the acceptance of the terms of the ordinance granting the franchise, and wilful nonuser in this regard gives the right of forfeiture. This doctrine applies either to forfeit the existence of a corporation or to forfeit the particular franchise owned by it.⁸⁶

with. We think the reasoning of the opinion in reaching that result is sound and is well within the rule that courts will construe the law strictly as against the existence of the franchise and in favor of the public." *State ex inf. v. West End Light & Power Co.*, 246 Mo. 653, 665, 672, 673, 152 S. W. 76.

Right to construct a street railroad of a designated street, unused for twenty-four years, held abandonment. *State ex rel. v. Public Service Commission*, 270 Mo. 429, 447, 450, 192 S. W. 958, P. U. R. 1917 D, 752.

⁸⁰ "The foregoing testimony shows no more than that the parties contemplated a possible resumption, if conditions of capital and combination should become favorable. It does show a complete present abandonment on account of inability to continue the use. It will hardly be claimed that mere financial inability to carry out the

terms of a contract is a legal justification of its breach. The evidence shows that it was determined by the owners that it was impracticable to continue the business. They abandoned the enterprise in fact, sold their lighting contracts and equipment and thus disabled themselves further to exercise the franchise. Furthermore, we do not think that the rights of the State, in case of nonuser, to resume the privileges granted, can be defeated by an intention which has remained hidden in the minds of the owners, and first brought to light after twenty years. By accepting the terms of the ordinance, the grantees of the privilege impliedly agreed to use it for the public benefit. And it is only upon such implied condition that the city has the right to grant the use of the streets." *State ex inf. v. Light & Development Company*, 246 Mo. 618, 640, 152 S. W. 67;

A mere attempt to revive and use an abandoned franchise will not preclude the state of the right of forfeiture where the grounds thereof existed before the attempted revival was made.⁸⁷

Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. 707; Julia Bldg. Assn. v. Bell Tel. Co., 88 Mo. 253, 57 Am. Rep. 398.

"When a corporation receives from the state a charter granting certain franchises or rights, there is at least an implied or tacit agreement that it will use the franchises thus granted; that it will use no others, and that it will not misuse those granted. A failure in any substantial particular entitles the State to come in and claim her own, the rights theretofore granted, and this through a judgment of forfeiture in a proceeding like the one at bar." Further, a failure may be shown to be wilful by the length of time of the nonuser. State ex rel. v. Delmar Jockey Club, 200 Mo. 34, 68, 69.

The doctrine applied to a franchise to use the streets for a street railway. Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W. 552.

"The power of the Court to declare the franchises of defendant forfeited for nonuser is undoubted. This defendant should not stand in the streets of Brooklyn claiming franchises which for many years it has refused to use, and thus bar out other railroads which might be constructed for public convenience and accommodation. If these franchises are of no value it is not harmed by the judgment of the special term. If they are valuable and of growing worth it

should have discharged its duty to the public by using them." People v. Broadway R. R. Co., 126 N. Y. 29.

When a corporation has assumed the performance of public duty to operate a street railroad, it cannot neglect this duty without forfeiting its franchises. State ex rel. v. Street Railroad Company, 72 Wis. 612.

"It must be held both on authority and reason that where the grant of a franchise is upon the implied condition that it shall be used for the public benefit, and there is a continued breach of the condition, whether because of misuser or nonuser, a cause for forfeiture exists." State ex inf. v. Light & Development Co., 246 Mo. 618, 642, 152 S. W. 67.

⁸⁷ Answering the contention that the right to forfeiture ceased when the grantee of the franchise became able and willing to resume its use, and in fact attempted to do so, the court said that the proposition relied upon supported by a statement of a text writer to the effect that, the right to prosecute for a forfeiture ceases with the cause upon which the information in quo warranto is based, was the result of the construction of a peculiar statute, and therefore deprived the decisions of any force as precedents. Continuing the court said: "Here the cause for forfeiture has not ceased; the nonuser has continued. This fran-

After a franchise has been abandoned for a period of years, and thus there exists ample ground on the part of the state to forfeit it, the mere sale and transfer of the franchise by the grantee will not give the purchaser thereof any right not possessed at the time of the transfer by the grantor, and hence, the purchaser cannot revive the franchise and by so doing defeat the right of the state in proceeding to forfeit the franchise.⁸⁸

§ 1665. Same—necessity for declaration of forfeiture or resort to courts.⁸⁹

§ 1666. Same—who may assert forfeiture.

Undoubtedly the state may assert a forfeiture of the franchise granted by a municipality.⁹⁰ When the consent of the municipality is required as a condition precedent to

chise was and is in complete disuse. It has been, to all intents and purposes, abandoned. The fair inference was that all claims thereunder had been surrendered to the state. There was, therefore, no occasion for the state to assert its right to forfeit this dead and apparently forgotten franchise until some attempt should be made to galvanize it into life. It cannot be that such attempt in itself deprives the state of a right of forfeiture which was complete before the attempt was made." *State ex inf. v. Light & Development Co.*, 246 Mo. 618, 642, 152 S. W. 67.

⁸⁸ *State ex inf. v. Light & Development Co.*, 246 Mo. 618, 642, 152 S. W. 67.

⁸⁹ Judicial forfeiture is necessary if the right to exercise the charter is involved, "but the consent of the municipality to the occupation of its streets by a railroad company, while involving a grant of power to the railroad company

and the right to exercise such power when granted, is not technically speaking a contract, but is in the nature of a privilege or license extended to the company so as to secure facilities for the accommodation and convenience of its citizens. The right must, of course, be based upon a charter, but it is but one of the rights granted thereunder. This being true the conclusion is authorized that the failure of the corporation to exercise this right may be lost through lapse of time, and that a judicial forfeiture necessary when the existence of the charter is involved is not necessary in a case of this character to render the particular forfeiture effective." *State ex rel. v. Public Service Commission*, 270 Mo. 429, 448, 192 S. W. 958, P. U. R. 1917 D, 752.

⁹⁰ *State ex inf. v. Light & Development Co.*, 246 Mo. 618, 152 S. W. 67.

the right to use the streets of the city in the exercise of a franchise for a public purpose, as lighting by electricity, the municipality in granting such consent and franchise is acting as an agency of the state, and in case of an alleged forfeiture or usurpation of such franchise the state may proceed by quo warranto to determine the warrant of authority in the party claiming and exercising such right.⁹¹

§ 1667. Same—waiver of forfeiture and estoppel to assert.

Where the existing conditions are conditions of non-user and complete abandonment, and such conditions have existed for a period of years, mere acquiescence will not constitute a waiver on the part of the state of the right to forfeit the franchise. Nonuser and abandonment, in this respect, should be distinguished from active misuser.⁹²

The state is not estopped to bring suit to test the forfeiture of a public lighting franchise by the mere acts of administrative officers of the city. The franchise is granted by the legislative body of the city as the agent of the state, and not by the municipal administrative officers.⁹³ Waiver of the forfeiture may arise from the

⁹¹ State ex inf. v. West End Light & Power Co. 246 Mo. 653, 665, 152 S. W. 76.

⁹² State ex inf. v. Light & Development Co., 246 Mo. 618, 643, 644, 152 S. W. 67.

⁹³ The approval of a bond conditioned that the grantee would observe all of the requirements of the franchise ordinance granting the right to supply the inhabitants with electric light after the franchise had been abandoned by non-user will not constitute a waiver by the city of the right to forfeit the franchise. The bond was approved by the mayor and one house of legislation. The act of approval

was held to be an executive not a legislative act. State ex inf. v. West End Light & Power Co., 246 Mo. 653, 666, 668, 152 S. W. 76.

A written opinion by the legal adviser of the city to the effect that the franchise ordinance was still valid and binding on the city and was not abandoned by non-user will not estop the city from asserting a forfeiture, nor does it constitute a waiver thereof. No power exists in such officer to bind the city in waiver or estoppel by his opinion. State ex inf. v. Light & Development Co., 246 Mo. 618, 647, 152 S. W. 67.

Assessment of the franchise by

action of the legislative body of the municipality clothed with authority to grant the franchise.⁹⁴

The grant of the right to string electric wires upon and along the streets of a city is the exercise of a delegated governmental power, and the franchise although granted by municipal ordinance is in effect a grant from the state and it follows that the right of the state to recall the grant, upon sufficient grounds, cannot be waived by the acts of the city officers.⁹⁵

the city assessor after the institution of the action to declare the forfeiture will not constitute waiver on the part of the state to assert the forfeiture. *State ex inf. v. Light & Development Co.*, 246 Mo. 618, 647, 152 S. W. 67.

⁹⁴ *State ex inf. v. West End Light & Power Co.*, 246 Mo. 653, 668, 152 S. W. 67.

⁹⁵ *State ex inf. v. Light & Development Co.*, 246 Mo. 618, 648, 152 S. W. 67.

"So far as the city grants the mere right to use the streets, it is exercising by delegation, a power which resides in the state, and which is by its nature governmental. It is in legal effect a grant by the state. Consequently, if grounds for forfeiture arise the state alone may enforce it and regain its grant, and the state alone may waive the forfeiture. In addition to the power delegated by the state to the city to exercise this governmental function, the city is also empowered to impose conditions upon the grant for its own benefit. It may determine the manner of the use, service to be rendered, compensation to be paid, etc. Regarding these matters, outside the mere right to use the streets, the city acts in its proprietary ca-

capacity, and herein waiver and estoppel may be invoked against the city, based upon the acts of the city officials done within the scope of their official duty. It has been said that 'franchise' is the grant from the state, of authority to occupy the streets; 'licenses' are the designation by the council of the streets to be occupied; and 'contracts' are the stipulated arrangements between the companies and the city, as to the manner of occupancy.'" (*Govin v. Chicago*, 132 Fed. 848.) "Treating the right to use the streets in question as a franchise in the above sense, we hold that the right of forfeiture by the state could not be waived by the acts of the city officials of the character above referred to." *State ex inf. v. Light & Development Co.*, 246 Mo. 618, 650, 152 S. W. 67.

"The city had no power or authority by ordinance or otherwise to take away from its sovereign the right to proceed by its public officer, the prosecuting attorney of the county, against the defendant by quo warranto for ouster of its franchises upon the ground of their forfeiture." *State ex rel. v. East Fifth St. Ry. Co.*, 140 Mo. 539, 558,

Where the grantee of a public lighting franchise has not changed its position to its detriment, or expended any money upon the faith of any of the acts of city officials, in apparent recognition of the validity of the franchise and the existence of the full rights of the grantee thereunder to supply the inhabitants with electric lighting, the state is not estopped to maintain a suit by quo warranto for forfeiture of the franchise for abandonment by non-user.⁹⁶

§ 1668. Same—procedure to forfeit franchise.⁹⁷

VIII. EFFECT OF GRANT AND RIGHTS AND DUTIES OF GRANTEE.

a. In General.

§ 1670. Effect of grant of franchise in general.

The rights of a grantee in public ways are subordinate to the public rights.⁹⁸

The grant of a license to lay tracks in public streets precludes any prosecution for a violation of a public right which is not *malum in se*, but does not relieve the grantee from liability for a special injury to an abutting property owner.⁹⁹

41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742.

⁹⁶ State ex inf. v. Light & Development Co., 246 Mo. 618, 651, 152 S. W. 67.

⁹⁷ Direct proceeding by quo warranto is proper remedy. State ex inf. v. Light & Development Co., 246 Mo. 618, 152 S. W. 67.

A provision in a franchise ordinance giving the municipality power to forfeit the franchise for breach, as failure to furnish a sufficient supply—water—the method of forfeiture is by another ordinance repealing the franchise ordinance or declaring it void. New-

som v. Rainier (Or. 1919), 185 Pac. 296.

Where a council was given power in a franchise ordinance to declare it forfeited on failure to furnish a sufficient supply—as water—the council's finding as ground of breach, was held binding on the court. Newsom v. Rainier (Or. 1919), 185 Pac. 296.

⁹⁸ Mt. Vernon v. Berman & Reed (Ohio 1919), 125 N. E. 116.

⁹⁹ Kurtz v. Southern Pac. Ry. Co., 80 Or. 213, 155 Pac. 367, affirmed in 80 Or. 213, 156 Pac. 794, which was an action by property owner to enjoin laying of tracks by grantee of franchise from city.

A permit to erect a post on a public sidewalk is not a franchise or a contract, but is a license which legalizes that form of obstruction in a highway which would otherwise constitute a nuisance.¹

§ 1672. Grant as a contract and impairment thereof.

When the grantee accepts an ordinance granting a franchise, it becomes a contract the terms of which are binding on the city and the grantee, and such contract cannot be varied by either without the consent of the other.² So when consent of the city to the use of streets by a railroad is a condition precedent to the granting of a franchise by the state, and the city gives its consent, a valid contract is thereby created which the city cannot subsequently alter or impair. While the city has power to regulate its streets and the use of its franchise by the railroad company it cannot impair or destroy the rights of the grantee under its contract.³

¹ Union Inst. for Savings v. Boston, 224 Mass. 286, 112 N. E. 637.

² Hillsdale Gaslight Co. v. Hillsdale, 258 Fed. (D. C.) 485, 487.

When a city enacts an ordinance licensing a public service company to maintain poles and wires in its streets for the necessary and reasonable conduct of its business, the ordinance when accepted and acted upon, becomes a contract which the city cannot arbitrarily disregard or abrogate. Sullivan v. Best (Ill. 1918), 121 N. E. 565.

"A grant by a city council to a public service company of a franchise to supply water and light to a municipality and the inhabitants thereof at a certain stipulated rate when accepted becomes a contract between the municipality and the grantee, and the conditions therein are binding the same as the terms of any other contract, both on the

municipality and the company." Arkansas Light & Power Co. v. Cooley (Ark. 1919), 211 S. W. 664, citing § 1672, vol. 4, ante; Springfield v. Inter State Tel. Co., 279 Ill. 324, 116 N. E. 631, affirming 201 Ill. App. 227, holding further that when a city passes an ordinance granting use of streets on certain consideration and such ordinance is accepted, the grantee thereof is excepted from the provisions of a general ordinance fixing a rental charge for placing telephone posts in streets which would be an additional consideration to that specified in its contract.

³ Grand Trunk Western Ry. v. South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. ed., reversing 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L. R. A. (N. S.) 850, which was an action to restrain a city from enforcing an ordinance which

The city may require a railroad company to pave parts of a street between and bordering its tracks according to the city's specifications, irrespective of whether by the terms of its franchise such paving is specifically required, when such requirement is provided for by statute under which the franchise was granted.⁴

§ 1674. Territorial limits of franchise.⁵

b. Police Powers.

§ 1677. Effect of grant on subsequent exercise of police power.⁶

repealed a prior ordinance granting permission to a railroad to lay a double track in a street of the city.

⁴Contention of railroad company that by terms of its franchise it is only required to grade and repair street between its tracks is not good where the statute under which the franchise was granted and which became part of the contract, provides that company shall pave street between tracks as the proper city authority may lawfully direct. *St. Helena v. San Francisco Ry. Co.*, 24 Cal. App. 71, 140 Pac. 600. Sec. 1647, vol. 4, ante.

⁵A general ordinance fixing water rates for a public utility in force in a city, covers rates in territory subsequently annexed, although a different rate fixed by private contract was in force before annexation. *State ex rel. v. Geiger*, 246 Mo. 74, 84, 154 S. W. 486. See *Des Moines v. Des Moines W. W.*, 95 Iowa 348, 64 N. W. 269.

⁶*People ex rel. Queens Borough Gas & Electric Co. v. Connolly*, 153 N. Y. S. 721, 89 Misc. Rep. 555; *Public Service Com. v. St.*

Louis & San Francisco Rd. Co., 4 Mo. Public Ser. Com. Repts. 116, 126-129.

See § 889, et seq., § 894, et seq., ante.

Exercise by city of power to authorize a street railway on a street at intersection with a boulevard under control of park commissioners is subject to reasonable restriction by the park commissioners. *Chicago City Ry. Co. v. Chicago Park Comrs.*, 257 Ill. 602, 101 N. E. 201.

City cannot divest itself of police power. *American Tobacco Co. v. Mo. Pac. R. Co.*, 247 Mo. 374, 157 S. W. 502; § 894, ante.

Police power of the state cannot be limited by a contract between municipality and public service corporation. Public service commission may order a railroad company to enlarge a tunnel under railroad tracks at street crossing, and apportion cost thereof, irrespective of contract between a city and a railroad company in respect thereto. *State ex rel. Missouri, R. & T. Ry. Co. v. Public Service Commission*, 271 Mo. 270, 197 S. W. 56.

§ 1682. Same—rule as applied to railways.⁷

City authorities cannot nullify the franchise of a public service company by refusing a permit to open streets to lay pipes but it may make acceptance of reasonable conditions the use to be made of the street a condition of granting the permit. *People ex rel. Queen's Borough Gas & Electric Co. v. Connelly*, 153 N. Y. S. 721, 89 Misc. Rep. 555.

Where by statute a public service commission is given the function of prescribing regulation relating to the facilities, service and business and the regulation of rates of public service corporations, a city cannot under the guise of the police regulations usurp such functions. City cannot compel water company to install meters at its own expense upon demand of a consumer, in order to prevent unjust and exorbitant charges, as regulation of charges is the province of the public service commission. *York Water Company v. York*, 250 Pa. 115, 95 Atl. 396.

7 "The improvement, regulation and control of highways within a municipality call for the exercise of a delegated governmental power, a function which the municipality itself, neither by ordinance nor by contract, can surrender or impair." So irrespective of a contract incorporated in a franchise with a street railway that company would pave one-fourth of the highway along its right of way whenever the city undertook improvement of remainder of such highway, a city may improve the whole of the highway and apportion the cost. *Me-*

Neil v. South Pasadena, 166 Cal. 153, 135 Pac. 32.

While city in the exercise of its police power may regulate the care of railroad structures on a public street and the operation of cars upon them, it cannot compel a railroad to relocate its tracks, which were placed on street under a franchise from the state and with the consent of the city. "The authorization to regulate the use of the streets does not contain or confer the right (to authorize the use of a street for railroad purposes); it does not empower the authorities of the city—to locate upon the streets the route or the tracks of a railroad or to participate in any way in creating, defining or controlling the franchise granted by the state." *People ex rel. New York v. New York Railways Co.*, 217 N. Y. 310, 112 N. E. 49, affirming 155 N. Y. S. 1133, 171 App. Div. 910.

In the exercise of its power to control the use of streets and to preserve to the public their right to the reasonable use of a street as a public thoroughfare, the city may by ordinance forbid the laying of tracks on a street and thereby prevent such use of a street by a street railway company which is authorized by its franchise to construct a street railway system in the streets of the city. *Ex parte Piatt*, 39 Okl. 63, 134 Pac. 53.

Ordinance may prescribe reasonable rules as to transfers. *Duke v. Metropolitan Street Ry. Co.*, 166 Mo. App. 121, 148 S. W. 166.

*c. Right to Attack Franchise.***§ 1687. Estoppel of municipality to object to use of streets.⁸***d. Duties and Liabilities of Grantee of Franchise.***§ 1688a. Governmental control of service and rates in general.**

The control of the service and rates of public utilities, as mentioned elsewhere in this work,⁹ is an attribute of sovereignty,¹⁰ a governmental police power. During recent years this power of regulation has greatly expanded, but it is true, it has its limitations.¹¹

Governmental regulations involve various important constitutional questions, as due process of law, equal protection of the laws, impairment of the obligations of contracts and the appropriate exercise of the police power. The regulation of interstate public service corporations involves laws of the United States and the proper functions of the Interstate Commerce Commission. The instrumentalities of regulation of public utilities may be state or federal, including the Congress, the state legislature directly or indirectly by a state board, or commission

⁸ Valdez v. Valdez Dock Co., 5 Alaska 399, 407, citing § 1687, vol. 4, ante.

When city has general power to grant the right to use streets, though the manner and condition of its exercise are determined by statute, and its actions have been such that great expenditures have been made on the faith that such permission has been given, it will be estopped to say that the conditions necessary to granting such permission did not exist. People ex rel. Fitz Henry v. Union Gas & Electric Company, 260 Ill. 392, 103 N. E. 245.

⁹ § 229A, et seq.

¹⁰ Chicago v. O'Connell, 278 Ill. 591, 603, 116 N. E. 210.

"Governmental control of corporations," 13 Columbia Law Review, 187, 201, by George W. Wickersham.

¹¹ Limitations of power to regulate public service companies stated in Northern Pacific R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L. R. A. 1917 F, 1448, Ann. Cas. 1916 A, 1, reversing 26 N. D. 438, 145 N. W. 135.

or a municipality. Regulations legally promulgated applicable to public service companies are usually sustained by the courts unless they are wholly arbitrary or unreasonable. This ground of attack is the one that finds the most favor. Objections to the delegation of power so frequently invoked are generally rejected by the court.

The legal presumption is in favor of the validity of regulations but it is a rebuttable presumption.

As the business of public utilities is affected with a public interest it is subject to public regulations; that is, the use of the property of public utilities is in the service of the public, and therefore it is subject to governmental control.¹² "Power to govern men and things is inherent in government, and when an owner devotes his property to a use in which the public have an interest, he must submit to be regulated and controlled by the public for the common good."¹³

Whether the municipality may regulate the service and rates of public utilities operating in its limits and serving the inhabitants of the community depends on how far such power has been granted by the state. As already mentioned,¹⁴ the regulation and control being an inherent sovereign power is primarily vested in the state and so remains until it is delegated by the state to a state agency whether a board, a commission or a municipality. The policy of a majority of the states is to place the power of regulation of all public service companies operating in the state in a board or a commission created by the state in the interest of uniformity; however, in some instances municipalities have power more or less limited to regulate the rates and service of utilities operating within their areas.

¹² *Wilson v. New*, 243 U. S. 332, 385, 61 L. ed. 755 L. R. A. 1917 F, 938; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

¹³ *Woodburn v. Public Service Com.*, 82 Oregon 114, 161 Pac. 391,

L. R. A. 1917 C, 98 Ann. Cas. 1917 E, 996; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011, L. R. A. 1915 C, 1189.

¹⁴ § 229 A, ante; § 1619, ante.

§ 1689. Duty to furnish supply or service.¹⁵

In the absence of a statute or a special contract obligation on its part, a gas company is not under the absolute and unconditional duty to extend its mains or pipes to new territory whenever requested, irrespective of the circumstances or conditions. Regard should be had to the reasonableness of the demand. Ordinarily extension is governed by a statute or a contract between the public and the public utility company generally incorporated in the ordinance. Sometimes the municipal authorities possess power to compel the extension, or sometimes it may be obtained upon the application of a specified number of inhabitants who agree to take and pay for the service. In the latter instance the persons to be supplied are generally required to be within a reasonable distance. The expense in providing for the service, of course, is an important consideration, and the probable revenue to be derived from the new service by the company which, it is true, is dependent on the number of new patrons likely to be obtained by the extension. In brief, the return on the outlay by the public service company should not be put out of view.¹⁶

§ 1697. Discrimination.

The law has always recognized a distinction between public and private callings respecting service and charges. Partially or an unjust or unreasonable service or charge is permissible in the latter but not in the former.¹⁷

The statement, one is a public service company, or engaged in a public calling, *ex vi termini* imports a duty

¹⁵*Luakrawka v. Spring Valley Water Company*, 169 Cal. 318, 146 Pac. 640; *Lawrence v. Richards*, 111 Me. 95, 88 Atl. 92; *Watson v. French*, 112 Me. 371, 92 Atl. 290; *Zeilda Forsee Inv. Co. v. St. Joseph Gas Company*, 196 Mo. App. 371; *Upper Alton v. Alton Gas, etc., Company*, 165 Ill. App. 333;

Hartford Board of Water Commission v. Bloomfield, 84 Conn. 522, 80 Atl. 794.

¹⁶*Smith v. Capital Gas Company*, 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769.

¹⁷*Phelan v. Boone Gas Co.*, 147 Ia. 626, 125 N. W. 208.

to the public and a corresponding legal duty in the public; a right common to all.¹⁸

There are many expressions in earlier judicial decisions condemning unjust discrimination on the part of public service companies as against sound public policy. Some of these go to the extent of asserting that independent of statutory provision unjust discrimination respecting service, rates and charges are in violation of public duty.¹⁹

The rule forbidding unjust discrimination has been variously expressed: The charges must be equal to all for the same service under like circumstances.²⁰ A public service corporation is impressed with the obligation of furnishing its service to each patron at the same price it makes to every other patron for the same or substantially the same or similar service.²¹

It "must be equal in its dealings with all."²²

It "must treat the members of the general public alike."²³ All patrons of the same class are entitled to the same service on equal terms.²⁴ "The law will not and cannot tolerate discrimination in the charges of these quasi-public corporations. There must be equality of rights to all and special privileges to none."²⁵

"A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all."²⁶

¹⁸ St. Louis A. & T. H. R. R. Co. v. Hill, 14 Ill. App. 579, 581.

¹⁹ Coke v. Chicago R. I. & Pac. Ry. Co., 81 Ia. 550; 46 N. W. 1180, 25 Am. St. Rep. 512, 9 L. R. A. 764; Atchison, T. & S. F. R. R. Co. v. Denver and N. O. R. R. Co., 110 U. S. 667, 674; Tift v. Southern Railway Co., 125 Fed. 789.

²⁰ St. Louis A. & T. R. R. Co. v. Hill, 14 Ill. App. 579, 585.

²¹ Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

²² State ex rel. v. Bell Tel. Co.

²³ Fed. 539, 541.

²⁴ Home Tel. Co. v. Sarcoux Light & Tel. Co., 236 Mo. 114, 128, 139 S. W. 108.

²⁵ Mooreland Rural Tel. Co. v. Mouch, 48 Ind. App. 521, 96 N. E. 193.

²⁶ Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

²⁷ Messenger v. Pacific R. R. Co., 36 N. J. L. 407, 13 Am. Rep. 457, 37 N. J. L. 531, 18 Am. Rep. 754.

“All should be treated alike; equality of rights requires equality of service.”²⁷ “The duty owed to all alike involves obligations to treat all alike.”²⁸ “The common law upon the subject is founded on public policy which requires one engaged in a public calling to charge a reasonable and uniform price to all persons for the same service rendered under the same circumstances.”²⁹

The numerous cases on this subject all tend to establish the same general principle, that those engaged in serving the public cannot make unreasonable and unjust discrimination, either in service or rates, among their patrons.

§ 1697a. Same—statutory provisions.

During recent years, especially in the last two decades, supervision and regulation of public service companies, both with respect to their service and rates, has occupied much of the attention of the legislatures, courts and commissions of the several states. Concerning just and reasonable charges, discrimination, undue or unreasonable preference or advantage, these regulatory statutes provide, in substance, that all charges made or demanded by any public service corporation or a municipality engaged in serving the public, or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order or decision of the appropriate commission; and that every unjust or unreasonable charge made or demanded for any supply, as water, gas, light, power or heat, or any service, or in connection therewith, or in excess of that allowed by law or by order or decision of the appropriate commission, is forbidden; that no public service corporation or municipality engaged in serving the public, shall directly or indirectly by any special rate, rebate, drawback or other device or

²⁷ Public Service Com. v. Iroquois Natural Gas Co., 179 N. Y. S. 230, P. U. R. 1920 B, 888.

²⁸ 2 Wyman, Public Service Corporations, §§ 1290, 1292.

²⁹ New York Tel. Co. v. Siegel Cooper Co., 202 N. Y. 502, 96 N. E. 109, 36 L. R. A. (N. S.) 560.

method, charge, demand, collect or receive from any person or corporation a greater or less compensation for a supply, as water, gas, light, power or heat, or any service rendered or to be rendered in connection therewith, except as authorized by law, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto, under the same or substantially similar circumstances or condition; and that no public service company, or municipality engaged in serving the public, shall make or grant any undue or unreasonable preferences or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality, or any particular description of service, to any undue or unreasonable preference or disadvantage in any respect whatsoever.

§ 1697b. Same—statutory and common law rule compared.

These regulatory statutes demand reasonable and non-discriminatory rates. At common law there is a distinction between rates that are not reasonable and rates that are unjustly discriminatory. For example, an excessive charge is not the precise equivalent of discrimination or inequality.³⁰

Hence, rates may be unreasonable without being unjustly discriminatory, but they cannot be unjustly discriminatory without also being unreasonable. Aside from variations due to abnormal conditions,³¹ the rea-

³⁰ *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470, 18 L. R. A. 221.

"Up to twenty-five years ago, the prevalent doctrine was that there was no rule against discrimination as such, unless it was shown that the higher rate was unreasonable." 2 *Beale & Wyman, Rail-*

road Rate Regulations (2nd Ed.) Section 613.

³¹ See *Louisa Heights Improvement Co. v. Boehn*, 4 Mo. Public Service Comm. 35, 37; *Kennebec Water Dist. v. Wateville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; *State ex rel. v. Seaboard Air Line Ry. Co.*, 48 Fla. 129, 37 So. 314.

sonableness of the rate is to be tested by the relation between the cost of furnishing the service and the charge for the service.³²

Independent of statute, contract or municipal regulation, the rate fixed by a public service company or a municipal corporation owning its own plant must be reasonable.³³ Fixing a smaller rate where a large amount of the supply, as water, is used is not unreasonable.³⁴ So rates may be made less to one class where there exists differences in conditions affecting the expenses or difficulty of performing the service which fairly justify a difference in rates.⁴⁰ So either a municipal corporation owning its own plant or a privately owned utility may require special rates proportioned to the expenses of the particular service.⁴¹ But can there be a reasonable charge which is not at the same time a substantially equal charge? Is not a charge unreasonable when it is unequal and in breach of the obligation of the public utility to the public?⁴²

According to the rule of the common law, as understood by some courts, should the public service company serve all at reasonable rates, it will be held that it has performed its obligation.⁴³ Thus it has been declared

³² See § 1744 et seq. post; § 1744 et seq., vol. 4, ante.

³³ *Chicago v. Northwestern Mut. Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770; *Culver v. Jersey City*, 45 N. J. Eq. 256; *Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Madison v. Madison Gas and Elec. Co.*, 129 Wis. 249, 264, 108 N. W. 65.

See § 1744, post; § 1744, vol. 4, ante.

³⁴ *Silkman v. Yorkers*, 152 N. Y. 327, 47 N. E. 612, 37 L. R. A. 827.

⁴⁰ *Williams v. Maysville Tel. Co.*,

119 Ky. 83, 82 S. W. 995; *Western Union Tel. v. Call Publishing Co.*, 44 Neb. 327, 62 N. W. 506.

§ 1697D, post.

⁴¹ *Southern v. Gouster*, 187 Mass. 552, 555, 73 N. E. 558, 69 L. R. A. 309; *Ladd v. Boston*, 170 Mass. 332, 335.

⁴² See *Samuels v. Louisville & Nashville R. R. Co.*, 31 Fed. 57; *Christie v. Mo. Pac.*, 94 Mo. 453, 7 S. W. 567.

⁴³ *Fitchburg R. R. Co. v. Gage*, 12 Gray (78 Mass.) 393; *Christie v. Mo. Pac. Ry. Co.*, 94 Mo. 453, 458, 7 S. W. 567; *Parsons v. Chicago & N. W. Ry. Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. ed. 231;

that "discrimination without partiality is inoffensive, and partiality exists only in cases where advantages are equal and one party is unduly favored at the expense of another who stands upon an equal footing." ⁴⁴

But agreeably to the better considered judicial judgments and the better reason the more complete development of this rule under modern industrial conditions exacts the further requirement that the public service company shall serve all with equality. Accordingly, even at common law, it is not admissible for a public service company to demand a different rate, charge or hire from various persons for an identical kind of service under identical conditions. Such partiality cannot square with the obligations of public employment. The public duty must be discharged for the equal benefit of all, and obviously to permit discrimination or inequality in the service or charges is to ignore the public obligation. ⁴⁵ The common right of all involves the obligation to give equal right to all for the same service. ⁴⁶

The service must be open to all on equal terms. Discrimination is opposed to sound public policy. ⁴⁷

The common law today forbids all discrimination between two applicants who ask the same service. ⁴⁸

Whether this rule was dictated by public opinion or is the consequence of a reasonable development in the law of public duty, it is needless to inquire. Certain it is the result of an evolution superinduced by the irresistible logic of industrial progress. At least it finds ample recognition in the various legislative enactments dealing with the subject. ⁴⁹

Johnson v. Pensacola & Perido R. Co., 16 Fla. 623, 26 Am. Rep. 731.

⁴⁴ Cleveland, C. C. I. Ry. Co. v. Closser, 128 Ind. 348, 353, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754.

⁴⁵ Messenger v. Pacific Ry. Co., 36 N. J. L. 407, 13 Am. Rep. 457, 37 N. J. L. 531, 18 Am. Rep. 754.

⁴⁶ Fitzgerald & Co. v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

⁴⁷ Schofield v. Lake Shore & Michigan Southern Ry. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

⁴⁸ 2 Wyman, Public Service Corp. § 1290.

⁴⁹ § 1697 A, ante.

Although the occasion for the development of the law against discrimination was the necessity of preventing inequality between and among shippers who were business competitors, it is clear that the late judicial decisions disclose that the rule is no longer restricted to this purpose but has become an universal principle to protect all who are being served.⁵⁰ The rule is now applied throughout all the public service as an integral part of the public service law.⁵¹

Thus the principle of equality designed to be enforced by legislation and judicial decision forbids any difference in charge which is not based on difference of service, and even when based on difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce unjust discrimination.⁵²

This is a question of fact. From this it follows that reasonable classification in establishing rates and charges is allowed.⁵³

§ 1697c. Same—statutory construction.

While the principles of the common law are operative in most of the states, except so far as they have been modified by constitution, legislation or judicial decision,⁵⁴ whatever may have been the common law rule relating to unjust discrimination, these regulatory statutes now control, and are to be construed and applied according to their spirit in the light of the unsatisfactory conditions prevailing with respect to the service and rates of public utilities prior to their enactment. In ascertaining the legislative intent, the touchstone of construction, we must have in mind the conditions ever present in the

⁵⁰ *Owensboro Gas Light Co. v. Hildenbrod*, 19 Ky. L. Rep. 983, 42 S. W. 351.

⁵¹ 2 *Wyman*, Public Service Corporations, § 1300.

⁵² *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 100, 103.

§ 1697 D, post.

⁵³ § 1697 D, post.

⁵⁴ 2, R. S. Missouri, 1909, § 8047; *Duke v. Harper*, 66 Mo. 51; *Reaume v. Chambers*, 22 Mo. 36; *Lindell v. McNair*, 4 Mo. 380.

operation of public utilities and the public regulations appertaining to them existing and capable of practical enforcement at the date of the new enactment, and the measure—scope and limitation—of supervision and regulation in harmony with the United States Constitution and laws and the state constitution designed by these regulatory statutes which would be beneficial alike to the public and to the utilities.

At the date of the enactment of these laws specific public regulations of utilities were meager and their enforcement often doubtful and halting. Regulation designed to be more effective and stringent took the form of laws, state and municipal. Their uniform and beneficial enforcement was difficult, and sometimes impractical by the governmental agencies as then constituted.

Combination of divers kind between and among the utilities existed. These combinations assumed a variety of forms and resulted in all sorts of inequalities, unjust discriminations, undue preferences, intolerable extortions and poor service. When these conditions were clearly realized a more efficient remedy was sought.⁵⁵

All this legislative has one common, definite purpose. It is distinctly remedial. It proceeds on the ancient common law doctrine, early established and never doubted, that public utilities perform a public service, that by reason of such service they are endowed by the state with a measure of sovereign power, and as a consequence all their patrons have equal rights, both in respect to service and charges.⁵⁶ These rights it is the obvious and durable obligation of the state to preserve and enforce by fair and appropriate methods agreeably to our governmental and legal system. In the first place it should be observed that, in these legislative acts supervision and regulation seek to require all public utilities operating in

⁵⁵ See *Re Kansas City Ry. Co.*, 3 Mo. P. S. C. 593, 603-605, P. U. R. 1916 E, 544, 553, 554.

⁵⁶ *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 100;

Knott v. Southwestern Tel. and Tel. Co., 2 Mo. P. S. C. Rep. 531, 540-543, P. U. R. 1915 E, 963, 973-983.

the state, whether owned by private persons, corporations or municipalities, not only to serve the public at reasonable rates or charges, but to require them also to serve the public efficiently and without unjust discrimination. The consensus of opinion everywhere is that such requirements are imperatively demanded by modern industrial conditions. True, as observed by the Supreme Court of the United States in a leading case, such equality of rights does not prevent differences in the modes and kinds of service and different charges based thereon.⁵⁷

In brief, in charges for service or in rate-making, reasonable classification may be adopted.⁵⁸

However, these laws are designed to enforce equality of service and charges and prevent unjust discrimination, and require the same charge for doing a like and contemporaneous service (e. g., supplying water, gas, light, power or heat) under the same or substantially similar circumstances or conditions. To impart this idea more completely, or to amplify, these laws in express terms forbid granting of undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subjecting any person, corporation or locality, or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.⁵⁹ In a word, rates or charges to be valid must not be unjust, unreasonable, unjustly discriminatory or unduly preferential.⁶⁰

It appears a simple thing to draft a law capable of practical and uniform enforcement preserving equality

⁵⁷ *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 100.

⁵⁸ See *Knott v. Southwestern Tel. Co.*, 2 Mo. Public Service Com. 531, 546-549, P. U. R. 1915E, 963, 973-983.

§ 1697 D, post.

⁵⁹ § 1697 A.

⁶⁰ "The public utilities act was

intended as an effective means of preventing unjust discrimination, undue preferences and extortionate rates and charges by public utilities." *Public Utilities Com. v. Chicago & West Towns Ry. Co.*, 275 Ill. 555, 114 N. E. 325, 328, Ann. Cas. 1917 C, 50.

of rates and service of public utilities under the same or substantially similar circumstances or conditions; that is, requiring the same charge for doing a like and contemporaneous service. The common law rule of equality sprang from the needs and convenience of the people served and hence, was evolved from their varied experiences with the service and rates of public utilities, chiefly common carriers and innkeepers, and developed mainly from individual instances. Notwithstanding it is usually urged that flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common laws,⁶¹ it is true that the common law rule on any given subject is not always readily and with precision deducible from its many precedents. At least judicial decisions, jurists and law writers do not always agree on the exact rule and its uniform application in all instances. In view of this uncertainty and confusion from the experience of the past, touching service and rates, our modern legislation seeks to establish a just formula designed to be a stablizer of public utility conduct. It may not be the best fruit of human reason. Moreover, human reason is not infallible. Although it may have been laid in wisdom it is certain that it does not rise in perfection. Few, if any, laws are perfect. The precise form of expression is modern, but the basic principle it means to have applied in the practical workings of public utility service and rates has its roots in the earliest crude regulations of public and quasi-public employment. Its imperfections, as those of all comprehensive laws, lie in the complicated and complex nature of the things it regulates. It deals with conditions of great variety and mutability. It may therefore fall short of perfection in its application to the various cases which it governs. In the wording of laws often the fine gradations of ideal justice are supplanted by the rough and ready advantage of certainty of expression. However, if too precise and definite in terms

⁶¹ *Hurtado v. California*, 101 U. S. 516, 530.

the laws become too inelastic and therefore impractical of administration. Since the enactment of these statutory regulations, courts and commissions have had occasion to consider carefully the policy of the law relating to discrimination in service and rates on the part of public service companies of various kinds, and have held invariably that any inequality of service or charges and unjust discrimination in whatever form practiced fall within the condemnation of these laws; that all unjust discrimination respecting rates or charges are in violation of public duty, contrary to the common law and against sound public policy; and that statutes forbidding unjust discrimination of whatever character are merely declaratory of the common law rule which is founded on public policy and requires one engaged in a public calling to charge a reasonable and uniform price or rates to all persons for the same service rendered under the same or substantially similar circumstances or conditions.⁶²

⁶² *Civic League of St. Louis v. St. Louis*, 4 Mo. P. S. C. 412, 450, P. U. R. 1917 B, 576; *Hannibal Trust Co. v. Southwestern T. & T. Co.*, 3 Mo. P. S. C. 451, 461-463, P. U. R. 1916 E, 525, 535, 538; *Knott v. Southwestern T. & T. Co.*, 2 Mo. P. S. C. 530, 540-549, P. U. R. 1915 E, 963, 973-983; *Weaver v. Kirksville L. & P. Co.*, 2 Mo. P. S. C. 225; *Berry v. Caruthersville Ice & L. Co.*, 2 Mo. P. S. C. 12; *Mexico v. Mexico L. P. & Ice Co.*, 2 Mo. P. S. C. 177. Statutes enforcing the common law liability of a public service company not to discriminate as to service or rates are merely an affirmation of the common law. *Cumberland T. & T. Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1211.

A rate of street car company in one locality which is largely in

excess of its rates in other localities similarly situated and subject to like conditions, is discriminatory. *Turner v. Connecticut Co.*, 91 Conn. 692, 101 Atl. 88.

Service to patrons of the same class must be measured by the same rate. *Re Joplin Water Works*, 2 Mo. P. S. C. 235; *Meek v. Consumers E. L. & P. Co.*, 2 Mo. P. S. C. 122, 144.

No unjust discrimination of any character will be countenanced, e. g., a method of discount which may result in inequality of charges. *Commercial Club v. Mo. Public Utilities Co.*, 2 Mo. P. S. C. 311, 353, 354.

It is unjust discrimination for a mutual telephone company to exact a different charge from its stockholders than it does from non-stockholders for the same service. *Crane Telephone Co. v. Barry*

§ 1697d. Same—classification.

Discrimination is not forbidden, but only unjust discrimination.⁶³ It is only arbitrary discriminations that are unjust.⁶⁴ It follows that reasonable classification in service and rates may be made.⁶⁵

Differences affecting the expense and difficulty of furnishing the service may fairly justify different rates.⁶⁶

That is, the rates may be proportioned to the expense of the particular service.⁶⁷

If the difference in rates is based upon a reasonable

County Mutual Telephone Co., 1 Mo. P. S. C. 127.

The furnishing of electricity free to the stockholders of an electric company, or to any other consumer, constitutes unjust discrimination. *Meek v. Consumers Electric & Power Co.*, 2 Mo. P. S. C. 122.

A special rate to stockholders is unlawful, "stockholders should benefit only in the way of dividends and a lower rate to stockholders is unjustly discriminatory." *Weaver v. Kirksville Light Power & Ice Co.*, 1 Mo. P. S. C. 564, 586; Compare *Re Ettrick Tel. Co.* (Wis. R. R. Com.), P. U. R. 1915 D, 695; *Re Dorsey Telephone Co.* (Neb. Com.), P. U. R. 1915 D, 694.

Furnishing service at a lower rate to physicians under municipal ordinances is unjust discrimination. *Butler v. Doniphan Telephone Co.*, 2 Mo. P. S. C. 81, 82.

The supplying of free telephone service to municipal authorities and the local public schools in consideration for the use of the streets and alleys is discrimination, where not so provided in the franchise. *Simms v. Columbia Telephone Co.*, 2 Mo. P. S. C. 256, 286.

A classification of telephone users whereby stockholders are given service free and others charged therefor is not based on sound reason and is therefore unjustly discriminatory. *Knott v. Southwestern Tel. & Tel. Co.*, 2 Mo. P. S. C. 531, 543, P. U. R. 1915 E, 963.

⁶³ § 1697, vol. 4, ante; § 1697, ante; *Fretz v. Edmond (Okla.)*, 168 Pac. 800, 803 citing § 1697, vol. 4, ante.

⁶⁴ 7 *Fletcher, Cyc. Corporations*, § 4498.

The rate may be reasonable, and also unlawful as a discrimination forbidden by statute. *Portland Ry. L. & P. Co. v. Oregon R. R. Com.*, 229 U. S. 397, 411, 57 L. ed. 1248, affirming 56 Ore. 468, 109 Pac. 273, 105 Pac. 709.

⁶⁵ § 1697 B, ante.

⁶⁶ *Williams v. Maysville Tel. Co.*, 119 Ky. 83, 82 S. W. 995; *Western Union Tel. Co. v. Call Publishing Co.*, 44 Neb. 327, 62 N. W. 506.

⁶⁷ *Souther v. Gloucester*, 187 Mass. 552, 555, 73 N. E. 558, 69 L. R. A. 309; *Ladd v. Boston*, 170 Mass. 332, 335.

and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination.⁶⁸

Thus a lower rate to telephone patrons furnishing their own equipment is a reasonable classification.⁶⁹ Public service commission or utility laws recognize that messages by telephone may be classified into day and night, repeated and unrepeatd, commercial, press, government, and such other classes as are just and reasonable and different rates may be charged for the different classes of messages.⁷⁰ In the absence of statutory authorization different rates may be charged for day and night messages, since the difference in the cost of service affords a sufficient basis for classification,⁷¹ but exacting a higher rate from new subscribers than from old subscribers for the same service is unreasonable classification and hence unlawful discrimination.⁷² There may be a classification of business and residence phones, however, the fact that a patron uses his residence phone in his business is not sufficient to warrant applying the rate for business phones to him, in the absence of a showing that his use thereby is substantially different from that of other residence phones.⁷³

So a telephone company may not charge a telegraph company more for service than it exacts of other business concerns simply because the telegraph company derives

⁶⁸ *United States v. Chicago & N. W. Ry. Co.*, 127 Fed. 785, 792; *Re Gardner*, 84 Kan. 264, 267, 113 Pac. 1054, 33 L. R. A. (N. S.) 956; *Com. v. Interstate Consol. St. R. Co.*, 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419; *State v. Missouri & K. T. R. Co.*, 262 Mo. 507, 525, 172 S. W. 35, L. R. A. 1915C, 778, Ann. Cas. 1916E, 949; *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 100, 45 L. ed. 765.

⁶⁹ *Butler v. Doniphan Telephone Co.*, 2 Mo. P. S. C. 81, 82.

⁷⁰ Mo. P. S. C. L. of Mo., § 87, par. 3.

⁷¹ *Western Union Telegraph Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. E. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622, second appeal, 58 Neb. 192, 78 N. W. 519, affirmed in 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765.

⁷² *Bradford v. Citizens Tel. Co.*, 161 Mich. 385, 126 N. W. 444, 137 Am. St. Rep. 516.

⁷³ *Moreland Rural Telephone Co. v. Mouch*, 48 Ind. App. 52, 96 N. E. 199.

a larger pecuniary benefit from such service than do other patrons. This constitutes no reasonable basis for classification and hence is unjust discrimination.⁷⁴

A rate less than the maximum may be fixed by a street railway for school children, or for passengers under a specified age, e. g., twelve years.⁷⁵

So street car fares may be fixed at a named sum for cash, and at a less sum where tickets or tokens are purchased in quantities.⁷⁶

But residents cannot be given a cheaper street car fare than non-residents.⁷⁷

A certain district served by a railway may be segregated from the rest of the territory served and a rate applicable to such district established based upon the property employed and used for service and earnings in that district alone.⁷⁸

The classification must be reasonable, just and fair, and preserve equality of rates and service and thereby preclude unjust discrimination within the contemplation of the regulatory statutes. As there is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines,⁷⁹ the determination whether a given classification offends the rule requiring fairness and equality should not be controlled alone by mere formula and thereby assume inequalities from the single circumstance of the difference in the rates appli-

⁷⁴ Postal Telegraph Cable Co. v. Cumberland T. & T. Co., 177 Fed. 726.

⁷⁵ Simpson v. Shepard, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916 A, 18; Interstate Consol. Bt. Ry. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 11 L. R. A. (N. S.) 973; San Francisco-Oakland Terminal Rys. v. Alameda, 226 Fed. 889.

⁷⁶ Street car rates may be fixed at five cents or six tickets for

twenty-five cents. Duluth St. R. Co. v. R. R. Com., 161 Wis. 245, 152 N. W. 887, distinguishing Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858.

⁷⁷ State v. Omaha & C. B. Ry. & B. Co., 113 Ia. 30, 84 N. W. 983, 52 L. R. A. 315, 86 Am. St. Rep. 357.

⁷⁸ Public Service Gas Co. v. Public Utility Comrs., 84 N. J. L. 463, 87 Atl. 651.

⁷⁹ Western Union Tel. Co. v. Call Publishing Co., 181 U. S. 92, 100.

cable to the several classes provided for, but rather by a reasonable judgment having its basis in a careful consideration of all relevant facts. In reaching the ultimate facts upon which the reasonable judgment should be exercised, the investigation should be directed to ascertaining whether the furnishing of the particular product—water, gas, electric light, power or heat—to the patrons of the respective classes constitutes separate and distinct kinds of service involving different labor, equipment, expenditures of money, etc., and thus fairly justify the different rates exacted. For to repeat, within the letter and spirit of the prohibition equality of rates is imperatively compelled for doing a like and contemporaneous service in the supply of the given product under the same or substantially similar circumstances or conditions. This, it would seem, is the criterion or final test as incontestably fixed by the legislative intent.⁸⁰

The requirement that all patrons should be treated alike, that is, that equality of right requires equality of service, forbids an order of a public service commission discriminating in favor of those who have gas connections and against those who have not, but need gas, where the supply is natural gas which is limited and failing and insufficient to supply all who desire it; nor has the gas company itself the right to make such discrimination. In brief, it is discrimination to limit the service to patrons who already have gas connections.⁸¹

§ 1697e. Same—"exceptional discrimination."

Prior to the enactment of these regulatory statutes, a charter provision involved in a particular case prohibited

⁸⁰ Civic League of St. Louis v. St. Louis, 4 Mo. Public Service Com. Rep. 412, 451-454, P. U. R. 1917 B, 576.

⁸¹ Public Service Com. v. Iroquois Natural Gas Co., 179 N. Y. S. 230, P. U. R. 1920 B, 888.

As to discrimination in the use of natural gas where the supply is

limited, that is, restricting its use to domestic users during certain months, see *People ex rel. v. Public Service Com.*, 176 N. Y. S. 163, P. U. R. 1919 D, 944, 949; *Public Service Com. v. Iroquois Natural Gas Co.*, 179 N. Y. S. 230, P. U. R. 1920 B, 888.

making rates for water on any other principle than that of producing revenue and forbade "exceptional discrimination." The municipality owned and operated the water plant. The ordinance under review gave manufacturers, regardless of the quantity of water used, a lower rate than persons engaged in any other business pursuit, and this class was subdivided and a lower rate was given to those who used fifty million gallons annually in one plant than to those who used the same quantity in a number of plants. The court held that this was not "exceptional discrimination," within the meaning of the charter provision.⁸²

As mentioned, this opinion was rendered prior to the enactment of general statutes regulating the subject, including a statute in the particular state. Even conceding that the charter provision involved in that case forbidding exceptional discrimination was properly construed in the light of the then prevailing common law rule, it is

⁸² "We are unable to see anything unequal, unreasonable or unjust in allowing a rate of one cent per hundred gallons to those manufacturers only who consume a certain specific quantity of water in one plant or factory. There is no exceptional discrimination in this classification for the rate is given alike to all who fall within the class. There is no claim made that a charge exacted is more than a fair equivalent for the water supplied. It seems entirely reasonable, therefore, and just to consumers, that the charges for water should be graded in proportion to the quantity used at one place or factory. It has never been denied that a city has a right to grade the charges according to the quantity of water consumed. The city was required to raise a revenue sufficient to pay the interest on the

water bonds and the expense of operating the waterworks. This sum was to be apportioned among the consumers in some just and reasonable proportion. The duty of making the apportionment devolved upon the city and was left to its judgment and discretion with which the courts should not interfere, except in case of manifest exceptional discrimination. When all of the same class are treated alike there is no such discrimination. *Parker v. Boston*, 1 Allen (Mass.) 361. The same principle of apportionment has been sustained in regulating charges for the use of wharfs belonging to a city. *St. Louis v. Transportation Co.*, 84 Mo. 156; *Packet Co. v. Keokuk*, 95 U. S. 80;" *St. Louis Brewing Association v. St. Louis*, 140 Mo. 419, 431, 432, 37 S. W. 525, 41 S. W. 911.

obvious that it is not controlling in the construction of the present statutory law, which not only forbids exceptional discrimination, but requires equality of rates for the same service under the same or substantially similar conditions or circumstances. It is apparent that the classification sanctioned by that decision could not be sustained under the present statutory law without doing violence to its letter and spirit. To tolerate such classification under the present law would be to ignore utterly its force and purpose.

§ 1697f. Same—discrimination—product below cost to manufacturers.

It sometimes occurs where the municipality owns and operates the plant that schedules of rates, as for example, water, are adjusted for the avowed purpose of encouraging the establishment of manufacturing plants within the locality. It is urged that high water rates would prevent this, and that custom has established such discrimination to some extent; that the question is not one of principle or law at all but is whether the given municipality as a matter of policy has the right to give a special rate to manufacturers, or to any other industrial class, in order to induce them to locate in and aid in developing the locality. It may occur in such adjustment that the price of water for purely manufacturing purposes is less than the cost thereof to the municipality. Clearly the establishment of such fact would reveal not only unquestionably unjust discrimination but also an unreasonably low rate to this class, and intolerable oppression upon the general water users, in that they would be compelled to pay in part for water and service furnished to a favored class. The exercise of power crystallized into legislation that unjustly discriminates between users of water in this manner, in effect, deprives those discriminated against of the use of their property without adequate compensation or due process of law, and turns it over to the favored class. It is in essence a species of taxation which takes the private property of the

general or public water users for the private use of water users engaged in manufacturing. This is abuse of power. No schedule of rates should for a moment sanction such inequitable condition. If it should be insisted that the rates to manufactures are just, all water users should be served for like rates. On the other hand, if the rates to the general users are just the rates to the manufacturers should be raised to correspond.

However, in determining the question of discrimination it is immaterial whether the manufacturers' rates are lower than cost or not. The law proceeds on the ground that the city cannot charge A or class A, whether the members thereof are manufacturers, merchants, doctors, lawyers or laundry men, more than it charges B or class B for a like and contemporaneous service, and if B or class B is getting water for cost only, the city has no right to charge A or class A more than that amount, and hence must lower it to A or class A. If B or class B is getting water below cost, the city has no right to charge A or class A higher rates, to raise revenue sufficient to pay operating expenses of the water system, and hence must increase the rates to B or class B.

The simple ground is that the city must treat all patrons alike and cannot charge one more than it does another for the same amount of water and identical service.⁸³

Moreover, the city cannot in any event employ its public powers to aid private ventures or individuals.⁸⁴

§ 1697g. Same—discrimination in interest of public.

Discrimination in the interest of the public and which benefit the people generally appear to be favored. Perhaps no rule can be formulated with sufficient flexibility to apply to every case that may arise. As once said: "It is only when the discrimination inures to the undue

⁸³ Civic League of St. Louis v. St. Louis, 4 Mo. P. S. C. Rep. 412, 455, 456, P. U. R. 1917 B, 576.

⁸⁴ § 359 A, ante.

advantage of one man in consequence of some injustice inflicted on another that the law intervenes for the protection of the latter.”⁸⁵

On the contrary, discriminations in favor of the public at large have been questioned and doubted;⁸⁶ they are not always favored. For example, a contract between a public service company and a municipality to supply electric power to the latter free of charge was held invalid as unjust discrimination.⁸⁷

§ 1697h. Same—discrimination by municipality.

The salutary provisions of these regulatory laws forbidding discrimination in service and rates, when no exceptions are made in them, furnish the measure for municipalities owning and operating their own plants in supplying the public with water, gas, electric light, etc., in the fixing of the schedule of rates or charges, in like manner as those provisions furnish the measure for all privately owned and operated public utilities within the state. The city having undertaken to furnish a public utility is to be governed in its duties and obligations and in its rights and privileges by the same rules as those which apply to private persons or corporations doing the same class of service.⁸⁸ The law recognizes no distinction between municipal government and public service corporations in the service of the public. Municipal ownership imposes the duty on the city to treat all classes of citizens who become its patrons alike.⁸⁹

⁸⁵ *Hays v. Pa. Co.*, 12 Fed. 309, 311; *United States v. Chicago & M. W. R. R. Co.*, 62 C. C. A. 465, 470, 125 Fed. 785, 790.

⁸⁶ *Public Service Elec. Ry. Co. v. Board of Public Utility*, 87 N. J. L. 128, 93 Atl. 707.

⁸⁷ *Kilbourn City v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499.

See § 1697, pp. 3594, 3595, vol. 4, ante.

⁸⁸ *State ex rel. v. Waseca*, 122 Minn. 348, 350, 142 N. W. 319, 46 L. R. A. (N. S.) 437.

⁸⁹ *State ex rel. v. Jones*, 141 Mo. App. 299, 304, 125 S. W. 1169.

See § 1803, post; § 1803, vol. 4, ante.

§ 1697i. Same—prior contracts.

Some regulatory laws authorize the furnishing of service under valid contracts in force at the date of the taking effect of the new law.⁹⁰

By virtue of such laws, the furnishing by any public utility of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to the date of the taking effect of the law, shall not constitute a discrimination within such law.⁹¹

IX. COMPENSATION TO ABUTTING OWNERS.

§ 1700. General consideration.⁹²

Neither the legislature or the municipal authorities have power to authorize the use of a public street in such a manner as to destroy rights of ingress and egress of abutting property owners, without compensation to such owners.⁹³

The general rule is that an additional burden cannot be placed upon a highway either by the legislature or by any municipal authority, without making compensation therefor to the owners of abutting property.⁹⁴

§ 1701. Commercial railroads.⁹⁵

⁹⁰ Missouri Public Service Com. Law Section 87, Paragraph 4.

⁹¹ *Superior v. Douglass County Tel. Co.*, 144 Wis. 633, 668, 122 N. W. 1023.

⁹² *Child & Co. v. Chicago*, 279 Ill. 623, 117 N. E. 115, affirming 203 Ill. App. 235, holding watchman's house on street, not additional burden, etc. Nor is a power plant. 198 Ill. App. 590.

⁹³ *Ver Steeg v. Wabash R. Co.*, 250 Mo. 61, 156 S. W. 689.

⁹⁴ *Bradley v. Degnon Contracting Co.*, 140 N. Y. S. 825, 80 Misc.

Rep. 90, affirmed in 141 N. Y. S. 852, 157 App. Div. 237.

Viaduct to carry street over railroad tracks is not. *Henry v. La Crosse*, 165 Wis. 625, 162 N. W. 174.

⁹⁵ Additional railway tracks as new servitude. *Williams v. Neri-dian L. & R. Co.*, 110 Miss. 174, 69 So. 596.

Railroad tracks in street where the fee is in the abutting property owners, held additional servitude. *Mitchell v. Chicago, B. & Q. Ry. Co.*, 265 Ill. 300, 106 N. E. 833.

§ 1702. Street railroads.⁹⁶

§ 1703. Same—elevated railroads.⁹⁷

§ 1706. Same—subways for rapid transit.⁹⁸

§ 1709. Subsurface use of streets.⁹⁹

X. RULES OF COMPANY.

§ 1712. Reasonableness of rules.¹

If fee is not in abutting owner surface road does not take his property. *Stanley v. Jay St. Connecting R. R.*, 169 N. Y. S. 530, reversing 166 N. Y. S. 119, 100 Misc. Rep. 493.

Carrying freight on railroad tracks in streets, held additional servitude. *Percy v. Lewiston A. & W. St. Ry.*, 113 Me. 106, 93 Atl. 43.

Steam railroad is additional servitude. *Turner v. North Carolina Public Serv. Co.*, 174 N. C. 522, 93 S. E. 998.

⁹⁶ Is not additional servitude. *Turner v. North Carolina Pub. Serv. Co.*, 174 N. C. 522, 93 S. E. 998; *Kirkpatrick v. Piedmont Traction Co.*, 170 N. C. 477, 87 S. E. 232.

“If abutting owner does not own the fee of the bed of the street, a surface railroad in the street does not take his property and any damage which may be caused to his property is *damnum absque injuria*.” *Stanley v. Jay St. Connecting R. R.*, 169 N. Y. S. 530, reversing 166 N. Y. S. 119, 100 Misc. Rep. 493.

⁹⁷ Additional servitude. *Re Ely Ave.*, New York City, 150 N. Y. S. 698, 88 Misc. Rep. 320, affirmed 153 N. Y. S. 1049.

⁹⁸ Additional servitude. *Re Ely Ave.*, New York City, 150 N. Y. S. 698, 88 Misc. Rep. 320, affirmed 153 N. Y. S. 1049.

Subway constructed by city. *Peabody v. Boston*, 220 Mass. 376, 107 N. E. 952.

⁹⁹ Sewers, gas and water pipes laid by city on land taken for street, no additional compensation necessary. *Carpenter v. Lancaster*, 250 Pa. 541, 95 Atl. 702.

Sewer in street, held not an additional servitude. *Carpenter v. Lancaster City*, 67 Pa. Super. Ct. 22.

Use of street to supply water to town residents is not, so as to entitle abutting owner who owns fee to the center of the street to compensation. *Beale v. Tacoma Park*, 130 Md. 297, 100 Atl. 379.

Water pipes and sewers in an alley are not. *Manchester v. Clarkson*, 195 Mich. 354, 162 N. W. 115.

Pipes, sewers and subway in streets, held no additional servitude. *MacGinnis v. Marlborough & Hudson Gas Co.*, 220 Mass. 575, 108 N. E. 364.

¹ Reasonable rules as to street car transfers are required. *Duke v. Metropolitan Street Railways Company*, 166 Mo. App. 121, 125, 148 S. W. 166.

§ 1713. Same—payments in advance.

“It is fully settled by the authorities that a gas company may enforce a regulation exacting payment in advance in reasonable amounts, or require that securities be deposited.”³

XI. CONTRACTS BETWEEN GRANTEE AND MUNICIPALITY.

§ 1717. In general.⁴

§ 1718. Power to make contract—water supply.⁵

³ *Collins v. Miami County Gas Co.* (Kan. 1919), 180 Pac. 769, 770, citing § 1713, vol. 4, ante; *Union Light, Heat & Power Co. v. Mulligan*, 177 Ky. 662, 197 S. W. 1081.

Notes: L. R. A. 1915 F, 1181; 43 L. R. A. (N. S.) 63; 31 L. R. A. (N. S.) 319, 329; 19 L. R. A. (N. S.) 693.

⁴ In making a franchise contract the municipality acts for the private benefit of itself and its inhabitants, and its contracts of that character are governed by the same rules that govern contracts of private individuals. *Arkansas Light & Power Co. v. Cooley* (Ark. 1919), 211 S. W. 664, 666, citing § 1717, vol. 4, ante.

⁵ Power to contract for public water supply authorizes a provisional contract with the water company promoters. *Belfast v. Belfast Water Co.*, 115 Me. 234, 98 Atl. 738.

Power to purchase water and light plant conferred by charter. *Packus v. Virginia*, 123 Minn. 48, 142 N. W. 1042.

“The charter of an Alabama municipal corporation containing the usual general welfare provisions,

and the power to adopt all needful provisions to obtain a water supply for the city, is sufficient to authorize the city to obtain a water supply by contracting, as well as by municipal ownership and operation, though no specific power to obtain it by contract appears in the charter.” *Birmingham Waterworks Co. v. Birmingham*, 211 Fed. 497, affirmed in 213 Fed. 450.

Where water commissioners are given power to acquire and construct water works to supply a village with water it may contract for an additional supply of water when it is found that the municipal plant acquired by them is inadequate. “The purpose of the legislature was to enable the defendant (village) to obtain a sufficient supply of pure and wholesome water.” “Power sufficient to authorize a municipality to provide a supply of water or light, in the absence of special restrictions carries with it the authority to make a proper contract with an individual or corporation therefor.”

Drew v. White Plains, 142 N. Y. S. 577, 157 App. Div. 394.

§ 1719. Same—validity of contract.⁶

§ 1721. Same—construction and operation of contracts for supply or service.⁷

§ 1723. Same—rescission or modification of contract.⁸

XII. RATES.

a. General Consideration.

§ 1729. Incidental charges including rent for meters.⁹

⁶ A contract between a city and a railroad company which limits the exercise by the state of its police power is void as against public policy. A public service commission may require the construction of a subway at a railroad crossing to meet public needs and apportion the cost thereof between the city and the railroad company irrespective of a contract between the city and the railroad company in regard thereto. *State ex rel. Missouri, K. & T. Ry. Co. v. Public Service Comm.*, 271 Mo. 270, 197 S. W. 56.

If a contract considered as a whole accomplishes the purposes for which it was authorized it cannot be attacked as unlawful. Where the purpose of a contract was to eliminate grade crossings and extend terminal facilities and such was the effect of the contract as a whole, the contract cannot be attacked on the ground that certain grade crossings were not eliminated. *McCutcheon v. Terminal Sta. Comm.*, 217 N. Y. 127, 111 N. E. 661, affirming 154 N. Y. S. 711, 168 App. Div. 301, in consideration of the validity of specific provisions of a contract between com-

missioners and railroad companies under powers conferred on such commissioners.

⁷ A contract between a municipality and a water and light company is not rendered void in its entirety by reason of the fact that in addition to contracting lawfully for a supply of city water and lights for a term of years, it also without authority sought to give the grantee an exclusive franchise for supplying water and lights to the inhabitants of the city. The fact that the city sought without authority to make the franchise for supplying the inhabitants exclusive, does not render other separable features of the contract void. *La Follette v. La Follette Water Co.*, 252 Fed. 762, so holding in a suit by the city to enforce specific performance.

⁸ As other contracts, a contract between a municipality and a public service company may be modified by mutual consent. *Arkansas Light & Power Co. v. Cooley* (Ark. 1919), 211 S. W. 664, 666, citing § 1723, vol. 4, ante.

⁹ *Tipton v. Tipton Light & Heating Co.*, 176 Iowa 224, 236, 157 N. W. 844, 848, quoting with

*b. Power to Fix Rates.***§ 1733. Power to contract as to rates as distinguished from power to regulate rates.¹⁰****§ 1734. Power of state to regulate rates.**

The regulation of rates of a public utility is an inherent attribute of sovereignty, an exercise of the police power.¹¹

approval all of § 1729, vol. 4, ante; Iowa Ry. & Light Co. v. Jones Auto Co., 182 Ia. 982, 987, 164 N. W. 780, citing § 1729, vol. 4, ante.

¹⁰ Virginia-Western Power Co. v. Commonwealth (Va. 1919), 723, 726, citing § 1733, vol. 4, ante; Benwood v. Public Service Com., 175 W. Va. 127, 83 S. E. 295, 297.

“A distinction must be kept in mind between the power to regulate rates and the power to contract as to rates. The regulation of rates for public service belongs to the police power of the state, and when delegated to the city, it belongs to the police power of the city.” Tipton v. Tipton Light & Heating Co., 176 Iowa 224, 239, 157 N. W. 844.

“There is a well-defined distinction between the authority of the city to regulate public utility rates from time to time and the authority to fix rates by contract for a definite period.” State ex rel. v. Billings Gas Co., 55 Mont. 102, 108, 173 Pac. 799, citing § 1733, vol. 4, ante.

“The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service com-

pany upon the terms of a franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion.” Woodburn v. Public Service Com., 82 Or. 114, 161 Pac. 391, 395, L. R. A. 1917C, 78, Ann. Cas. 1917E, 996.

¹¹ Section 229C, ante. Hudson Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. ed. 828, 14 Ann. Cas. 560; Idaho P. & L. Co. v. Blomquist, 26 Idaho 222, 141 Pac. 1083; Yeatman v. Towers, 126 Md. 513, 95 Atl. 158; State ex rel. v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; Georgia Rys. & Power Co. v. Georgia R. R. Com. (Ga. 1919), 98 S. E. 696, 698.

“Rate-making is a legislative act. It is inherent in and belongs primarily to the legislature. The rate-making power is a power of government—a police power of the state.” Benwood v. Public Service Com., 175 W. Va. 127, 83 S. E. 295, 296, L. R. A. 1915C, 261.

“The power to fix and regulate rates as to public utilities was at common law one inherent in the state. Munn v. People, 69 Ill. 80. No express grant was necessary to vest it in the legislature.” State

This power may be delegated by the state to a municipal corporation to be exercised over public service companies operating within their limits,¹² but it can be so delegated only by clear and express terms, and all doubts must be resolved against the municipality.¹³

Public Utilities Com. v. Quiney (Ill. 1919), 125 N. E. 374.

That the state had the general power to regulate rates to be charged by public service corporations operating under a franchise granted either by the state or a municipal corporation cannot be questioned. *Joplin v. Wheeler*, 173 Mo. App. 590, 598, 158 S. W. 924.

"Power to govern men and things is inherent in government and when an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good.

*** * *** The right to regulate the rates to be charged by a public utility inheres in the power to govern. The regulation of rates for the purpose of promoting the health, comfort, safety and welfare of society is an exercise of the police power, and is therefore an attribute of sovereignty." *Woodburn v. Public Service Com.*, 82 Or. 114, 161 Pac. 391, 393, L. R. A. 1917C, 78, Ann. Cas. 1917E, 996.

"The power is an attribute of sovereignty and is primarily vested in the legislature, which has the right to recall it at any time from the agency to which it has been delegated." *Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210; *Chicago v. Dempey*, 281 Ill. 257, 117 N. E. 1010.

¹² *Denver v. Mountain States*

Telephone & Tel. Co. (Colo. 1919), 184 Pac. 604, 607, citing § 1734, vol. 4, ante; *Tipton v. Tipton Light & Heating Co.*, 176 Ia. 224, 227, 157 N. W. 844; *Joplin v. Wheeler*, 173 Mo. 590, 598, 158 S. W. 924.

"The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders, and that power may be with wisdom and propriety conferred on a municipal corporation, but it is not a power appertaining to the government of the city and does not follow as an incident to a grant of power to frame a charter for a city government." *State ex rel. v. Missouri and Kansas Tel. Co.*, 189 Mo. 83, 100, 88 S. W. 41.

¹³ *Benwood v. Public Service Com.*, 175 W. Va., 127, 83 S. E. 295, 296; *Woodburn v. Public Service Com.*, 82 Ore. 114, 161 Pac. 391, 394, L. R. A. 1917C, 78, Ann. Cas. 1917E, 996.

"The state's power to regulate by compulsion the charges of public service corporations, is one of such vast and increasing importance to the public that the courts will not attribute to the state the intention to part with it, or to delegate it, unless the intention is clearly and unmistakably expressed." *Charleston Consol. Ry. & Lighting Co. v. Charleston*, 92

A constitutional provision, in substance, that the legislature may not grant the right to construct and operate a street railroad within a municipality without requiring the consent of the local authorities having control of the streets and highways proposed to be occupied, it has been held, "is simply a limitation of the general powers of the legislature, and in one particular only." It "does not by implication or otherwise, attempt to divest the state of its paramount authority and control of streets and highways." And it is equally clear, moreover, that it does not deprive the legislature of the power to fix rates for such companies.¹⁴

Of course, neither the state nor the municipality can fix rates relating to interstate commerce,¹⁵ but the state may regulate rates within its borders of interstate public service corporations.¹⁶

§ 1735. Same—delegation to a commission.

Power to regulate rates of public service corporations

S. C. 127, 75 S. E. 390, 391, following *Home Telephone & Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 50 L. ed. 176.

The grant of the city must be clear and express. "The presumption is against exclusive delegation of the legislature's sovereign rate-making power to a municipality. Unless there has been such delegation by clear and express terms the power it reserved in the state which can exercise it at such times and to such extent as may be found advisable." *Benwood v. Public Service Com.*, 175 W. Va. 127, 83 S. E. 295, 297.

Legislative rate will supersede a rate established by contract between the municipality and the public service company, because when such contract was entered into the liability of change due to

the superior rights of the state had to be taken into account. Such rates may be established by the legislature directly or indirectly through a commission created by it. *State ex rel. v. Geiger*, 246 Mo. 74, 84, 85, 154 S. W. 486, L. R. A. 1916A, 1060.

¹⁴*Public Utilities Com. v. Chicago & West Towns Ry. Co.*, 275 Ill. 555, 114 N. E. 325, 330, Ann. Cas. 1917 C, 50, approved in *Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210, 213.

¹⁵*Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 107, 56 L. ed. 1004; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416.

¹⁶*Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307, 29 L. ed. 636; *State Public Utilities Com. v.*

may be delegated by the state to a commission.¹⁷ In fixing rates such commission merely acts for and in behalf of the state.

§ 1736. Power of municipality to regulate rates.

The consideration of the power of a municipality to regulate rates involves two distinct propositions, namely, (1) either as a part of the license, privilege or franchise to use the streets, or otherwise, can a municipality enter into a binding contract with a public service company as to future rates? and (2) can a municipality against the objection of the public service corporation or the person supplying the service, or of the patron fix the rates of the company, that is, has a municipality power to fix rates other than by virtue of a contract?¹⁸

The first question is treated in other sections,¹⁹ and the second herein. As the power to regulate private

Atchison, T. & S. F. R. Co., 278 Ill. 58, 72, 115 N. E. 904.

¹⁷ Florida. State v. Florida East Coast R. Co., 69 Fla. 480, 68 So. 729.

Georgia. Dawson v. Dawson Tel. Co., 137 Ga. 62, 72 S. E. 508.

Illinois. State Public Utilities Com. v. Quincy (Ill. 1919), 125 N. E. 374.

Kansas. State ex rel. v. Wyandotte County Gas Co., 88 Kan. 165, affirmed 231 U. S. 622; Emporia v. Emporia Tel. Co., 90 Kan. 118, 133 Pac. 858; State v. Flannelly, 96 Kan. 372, 382, 152 Pac. 22.

Missouri. State ex rel. v. Public Service Commission, 259 Mo. 704, 168 S. W. 1156; Union Electric Light & Power Co. v. St. Louis, 253 Mo. 592, 161 S. W. 1166.

Massachusetts. Board of Survey of Arlington v. Bay State St. Ry., 224 Mass. 463, 113 N. E. 273; Fall City v. Public Service Commission, 228 Mass. 575, 117 N. E. 915, 917.

Nebraska. State v. Clarke, 98 Neb. 566, 153 N. W. 623.

New York. Saratoga Springs v. Saratoga Gas, etc., Co., 107 N. Y. S. 341, 122 App. Div. 203.

Oregon. Woodburn v. Public Service Com., 82 Or. 114, 161 Pac. 391, L. R. A. 1917 C, 98, Ann. Cas. 1917 E, 496; Gates v. Public Service Com., 86 Or. 442, 168 Pac. 939, 67 Pac. 791.

Washington. State v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915 C, 287, Ann. Cas. 1913 D, 78.

United States. Portland Ry. Light & Power Co. v. Portland, 210 Fed. 667.

Constitution of Arizona confers power upon commission. State v. Tucson Gas, E. L. & P. Co., 15 Ariz. 294, 138 Pac. 781.

¹⁸ See 7 Fletcher, Cyc. Corporations, § 4480.

¹⁹ Sections 1737, 1737 A, 1737 B, 1738 and 1739, post; §§ 1737, 1738 and 1739, vol. 4, ante.

property devoted to public use is vested in the state, and includes the power to regulate rates,²⁰ obviously such power does not appertain to the government of a city; it is not municipal in character; nor is it even an incident to a grant of authority to enact or amend a charter for a city or town.²¹

²⁰ Section 229 C, ante; § 1734, ante, § 1734, vol. 4, ante.

²¹ *Woodburn v. Public Service Com.*, 82 Or. 1141, 161 Pac. 391, 394, L. R. A. 1917 C, 98, Ann. Cas. 1917 E, 996.

If the power is not granted, a city may not regulate gas rates, as this is not a power of local self-government. *Kalamazoo v. Titus* (Mich. 1919), 175 N. W. 480.

"Until the adoption of our Constitution in 1875 all cities in the state derived their charter powers from the General Assembly, and therefore whatever was contained in a city charter had the full force of a legislative enactment. But under that Constitution cities of certain descriptions were authorized to frame their own charters. A charter framed under that clause of the Constitution within the limits therein contemplated has the force and effect equal to one granted by an act of the Legislature.

"But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality, yet the

Legislature may, if it should see fit confer on the city powers not necessary or incident to the city government. There are governmental powers the just exercise of which is essential to the happiness and well being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution 'may frame a charter for its own government,' mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. Nor does the Constitution confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are many matters local to the city, requiring governmental regulation, which are foreign to the scope of municipal government. In none of the cases that have been before this court bringing into question the charters of St. Louis and Kansas City under the Constitution of 1875, have we given to this constitutional provision any

Therefore, it is settled law that a municipality has no power to fix rates for public service otherwise than by contract with the corporation or person rendering the service,²² unless the power to do so has been delegated by the state either expressly or by necessary implication.²³

Power granted to municipalities to fix by ordinance

broader meaning than above indicated." *St. Louis v. Bell Tel. Co.*, 96 Mo. 623; *State ex rel. v. Field*, 99 Mo. 353; *Kansas City ex rel. v. Scarritt*, 127 Mo. 646; *State ex rel. Subway Co. v. St. Louis*, 145 Mo. 551, 574; *Kansas City v. Stegmiller*, 151 Mo. 189; *Young v. Kansas City*, 152 Mo. 661.

"The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders, and that power may be with wisdom and propriety conferred on a municipal corporation, but it is not a power appertaining to the government of the city and does not follow as an incident to a grant of power to frame a charter for a city government." *State ex rel. v. Missouri & Kansas Telephone Co.*, 189 Mo. 83, 99, 100, 88 S. W. 41.

Municipality has no power to fix the prices at which ice shall be sold at retail in the city. *Greene v. Cook*, 219 Mass. 121, 106 N. E. 573, 576.

"Under the guise of a police power cities cannot undertake to determine the reasonableness of rates charged by public service corporations, nor can they prescribe regulations relating to the facilities, service and business of such

corporations," where such powers are vested in a state commission. *York Water Co. v. York*, 250 Pa. 115, 95 Atl. 396.

Contra. Under the Constitution of Colorado, Denver, it is held, may regulate telephone rates within the municipal area, on the ground that such regulation is "a local or municipal matter." "The constitutional article in question is different from the so-called 'home-rule' provisions in the constitutions of other states. * * * It has no counterpart in the constitutions of other states. In other states the power to make a charter for 'home rule' cities is subject to the constitution and laws of the state. With us the only constitutional provision that may affect the charter is Article 20 and legislative acts in conflict with the charter provisions enacted in pursuance of Article 20 have no force and effect within the municipality." *Denver v. Mountain States Telephone Co.* (Colo. 1919), 184 Pac. 604, 607, 608.

²² Section 1738, post; § 1738, vol. 4, ante.

Statute authority, held gave city power to fix gas rates for ten years in franchise contract with public service company. *Hillsdale Gas-light Co. v. Hillsdale*, 258 Fed. (D. C.) 485, 488.

²³ Iowa. *Tipton v. Tipton Light*

the charges for telephone service "within their corpo-

& Heating Co., 176 Ia. 224, 157 N. W. 844.

Kentucky. United Fuel & Gas Co. v. Commonwealth, 159 Ky. 34, 166 S. W. 783.

New York. Public Service Com. v. Westchester St. R. Co., 206 N. Y. 209, 99 N. E. 536, affirming 135 N. Y. S. 1138, 151 App. Div. 914.

West Virginia. St. Mary's v. Hope Natural Gas Co., 71 W. Va. 76, 76 S. E. 841, 43 L. R. A. (N. S.) 994.

United States. Iowa Tel. Co. v. Keokuk, 226 Fed. 82, 101; Cumberland Tel. & Tel. Co. v. Memphis, 200 Fed. 657.

Section 1736, vol. 4, ante.

Water board has power to fix water rates. New Orleans Taxpayers Protective Ass'n v. New Orleans Sewerage & Water Board, 132 La. 839, 61 So. 843.

Village board of water commissions has power to fix the water rents and to collect the same. Liberty v. Newkirk, 137 N. Y. S. 494, 77 Misc. Rep. 214.

By statute cities may regulate from time to time the price gas companies may charge for gas for lighting or fuel purposes. Newark Natural Gas & Fuel Co. v. Newark, 92 Ohio 393, 111 N. E. 150, affirming 3 Ohio App. 383, 35 Ohio Cir. Ct. R. 94.

Express power; may fix by ordinance. Home Tel. Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301. But power was subsequently withdrawn by statute creating public service commission for the state.

Must be conferred by constitutional or legislative authority. Virginia-Western Power Co. v. Commonwealth (Va. 1919), 99 S. E. 723.

Power conferred. Mutual Electric Co. v. Pomeroy (Ohio 1919), 124 N. E. 58.

"The municipal authorities of this state have never been clothed with power to fix, by binding contract, rates for any definite term of years." State Public Utilities Com. v. Quincy (Ill. 1919), 125 N. E. 374.

Municipality denied power to fix the rates of fares on street railway which it had constructed. Georgia Ry. & Power Co. v. Georgia Railroad Com. (Ga. 1919), 98 S. E. 696, 701, citing § 353, vol. 1, ante. (McQuillin, Mun. Ord. § 48.)

A city has power when authorized by the constitution or statute to contract for the rendering of public service by individuals or private corporations, and in such contract fix the rates to be charged for such service. Watertown v. Watertown Light & Power Co. (S. D. 1919), 173 N. W. 739.

"Beyond all doubt it is now, and we may say always has been, the universal holding of the courts that a municipality has no power to agree upon rates or charges by public service corporations unless the power to make such a contract was expressly granted by legislative act, or the power to make such contract can be held to be indispensable to the exercise of powers which have been expressly granted. It cannot be denied that the court have applied this rule with the ut-

rate limits," is manifestly restricted to telephone service within the municipal area.²⁴

The general rule usually enforced is that when the limits of a municipality are extended all ordinances and contracts of a general character, in the absence of a special provision to the contrary, are simultaneously extended over and become operative in the added territory, and such territory becomes subject to the burdens and entitled to the same privileges as that within the original limits.²⁵

Accordingly it was held that where a general ordinance fixing water rates for a public service corporation was in force in a city, such rates would apply to annexed territory, though different rates fixed by private contract were in force in such territory before it was annexed.²⁶

On the contrary, the same court later held that an ordinance fixing a rate for a water supply to a patron beyond the city limits would continue in force after the patron was included within the city upon extension of

most strictness." *Ottumwa Ry. & Light Co. v. Ottumwa* (Ia. 1919), 173 N. W. 270, 272.

Where it is doubtful as to power of municipality to fix rates, the power will be denied. *State ex rel. v. Railroad Commissioners* (Fla. 1920), 84 So. 444, 447; *State ex rel. v. Burr* (Fla. 1920), 84 So. 61, 70.

²⁴ Therefore, evidence tending to show a large amount of free service afforded to resident subscribers with persons outside of the city limits and in neighboring towns was held not relevant to the issue of the reasonableness of the rates provided by the ordinance for service which was wholly within the city. The company was as much entitled to remuneration for service extending beyond the city limits as for service within, but

the ordinance does not include such service, and the subscriber could not legally be charged a higher rate for city service because of free service outside. Neither should the cost of serving subscribers with city service be burdened with additional and more expensive apparatus and facilities made necessary solely by reason of the extension of the telephone plan for business connections beyond the limits of the city. *Home Telephone Co. v. Carthage*, 235 Mo. 644, 656, 657, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301.

²⁵ Section 293, ante; § 293, *vql.* 1, ante; § 657, ante; § 657, vol. 2, ante.

²⁶ *State ex rel. v. Geiger*, 246 Mo. 74, 84, 154 S. W. 486, L. R. A. 1916A, 1062, 1071 (annotation).

its limits; that the extension would not affect an existing private contract which was not subject to regulation by ordinance at the time it was made.²⁷

A state law granting power to a municipal corporation to fix rates of public utilities operating within their limits may be repealed by a subsequent law, as one creating a public service commission in which is vested power to regulate rates.²⁸

§ 1737. Regulation of rates must not impair obligation of contract.²⁹

The main question therefore is: Did the state or municipality have power to make a contract as to rates to

²⁷ State ex rel. v. Eastin, 270 Mo. 193, 192 S. W. 1006 (set out in § 1737 post).

²⁸ Union Electric Light & Power Co. v. St. Louis, 253 Mo. 592, 161 S. W. 1166.

See § 229D, ante.

²⁹ Atlantic Coast El. R. Co. v. Public Utility Board, 98 N. J. L. 407, 99 Atl. 395; North Wildwood v. Public Utility Com'rs, 88 N. J. L. 81, 95 Atl. 749; Public Service Ry. Co. v. Public Utility Board, 85 N. J. L. 123, 88 Atl. 818; Columbus Ry. Power & Light Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349; Virginia-Western Power Co. v. Commonwealth (Va. 1919), 99 S. E. 723, 726, citing § 1733, vol. 4, ante; Central Union Tel. Co. v. Indianapolis Tel. Co. (Ind. 1920), 126 N. E. 628.

"The granting of a franchise fixing a maximum rate is a contract, and when the franchise itself does not reserve to the city future control of the rates to be charged for service, or the constitution or statute under which the city acted in granting the franchise does not re-

serve to such city future control over such rates, including the power to change the same, such franchise becomes a binding contract no more subject to impairment than would be the contract of individuals. Such a contract could not be impaired by amendment of the constitution, nor by a change of the statutory law, nor by the fact that the city becomes organized under general laws or under a new special charter." Watertown v. Watertown Light & Power Co. (S. D. 1919), 173 N. W. 739.

"If the state or a municipality has fixed the rates to be charged by a public service company, so as to constitute a contract with the company, and such a contract is within the power of the state or municipality, and no authority to repeal, amend or change the rates has been reserved either expressly or by virtue of existing constitutional or statutory provisions, such contract is protected by the contract clause of the federal constitution and cannot be impaired by subsequently changing the rates. This

operate without change during its existence unless modified by consent? This question may be divided: First, is there a valid contract as to rates, whose obligation is capable of impairment? and second, if such contract exists, does the regulation involved, in fact, constitute such impairment? Concerning the first, an enforceable contract as to rates may arise (1) from the terms of the charter of the corporation, or (2) from the terms of the license, privilege or right or franchise to use the streets granted to the public service company by the local authorities. Relating to whether a contract as to rates was created by the grant of the local authorities to use the streets and public ways, two questions press for solution, namely, (1) Did the state delegate to the municipality the power in granting the terms and conditions as to the occupancy of the streets, etc., to fix the rates so as to create a contract as to them beyond the power of the state to change; that is, does the power to name terms and conditions, include the power to make a contract as to rates, which cannot be changed even by the sovereign power of the state in the public interest? and (2) Does the grant of the local authorities in fact fix a rate which cannot be changed?

A municipality acting on its proprietary side as a business corporation, if the state does not interpose, may contract as to rates which will bind it and a public service company, but if it acts by virtue of its delegated powers as a governmental instrumentality or agent of the state, etc., the ordinance is legislative in character, and is not impairing the obligation of a contract.³⁰

A municipality may make a binding contract as to rates, at least so far as the public service corporation is concerned, although it has no power to make a contract as to rates which will bind the state.³¹

Thus exclusive control of a city over its streets for

rule has frequently been applied to the rates of street car companies, gas companies, water companies, and other public service

corporations." 7 Fletcher, Cyc. Corp., § 4488.

³⁰ 7 Fletcher, Cyc. Corp., § 4494.

³¹ 7 Fletcher, Cyc. Corp., § 4490.

specified purposes with authority to grant right of user to public service corporations was held sufficient authority to support a contract between such a corporation and the city, but that such contract would not bar the state from exercising its power of regulation.³²

A statute empowering a municipality to grant by ordinance only street railway franchises, it has been held, is not a grant of power to prescribe rates of fare that cannot be changed (increased) thereafter by the state through a public service commission.³³

If the regulation of rates is to be considered a sovereign power, a branch of the police power of the state, as is usually held,³⁴ it follows that such power cannot be abrogated by contract or otherwise.³⁵

Express power to regulate rates conferred upon a municipality by statute cannot be abrogated by the city by contract, that is, it cannot by contract divest itself of such power.³⁶

Under a statute conferring power upon municipalities "to prescribe and fix maximum rates and charges," and "at all times during the existence" of the franchise grant, to "have the right by ordinance to fix a reasonable schedule of maximum rates to be charged," a municipality, it has been held, has no power to contract as to

³² *Winfield v. Public Service Commission* (Ind. 1918), 118 N. E. 531.

³³ *Denver v. South Platte Railway Co. v. Englewood*, 62 Colo. 229, 161 Pac. 151, P. U. R. 1916E, 134, 4 A. L. R. 956, following *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176.

³⁴ See cases in subsequent notes of this section.

³⁵ "There is some authority, however, for the proposition that the regulation of rates is such an exercise of the police power that it

cannot be bargained away by contract or otherwise, although it is doubtful if there is any late well-considered case so holding, and the authorities to the contrary are so numerous that such other decisions must be considered as not representing the present law even in a particular jurisdiction." 7 *Fletcher, Cyc. Corp.*, § 4489.

³⁶ *Ft. Smith Light & Traction Co. v. Ft. Smith*, 202 Fed. 581, citing as authority *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 56 L. ed. 594.

rates so as to preclude the state or municipality from changing the rate thereafter.³⁷

The state or municipality may modify a contract as to rates between a public service company and its patrons, without impairing the obligations of contracts,³⁸ since the fixing of rates is an exercise of the police or governmental power which supersedes private contracts fixing such rates, and all private contracts are necessarily made subject to the proper exercise of such power.³⁹

³⁷ Wyandotte County Gas Co. v. Kansas, 231 U. S. 622, 58 L. ed. 404, affirming 88 Kan. 165, 127 Pac. 639.

As the police power cannot be contracted away a state commission may change the rate for water hydrants fixed by ordinance. State ex rel. v. Public Service Com., 275 Mo. 201, 204 S. W. 497.

³⁸ United States. Portland Ry. L. & P. Co. v. Portland, 200 Fed. 890.

California. Limoneira Co. v. Railroad Com., 174 Cal. 232, 238, 162 Pac. 1033; Pinney & Boyle Co. v. Los Angeles Gas & El. Corp., 168 Cal. 12, 141 Pac. 620, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471.

Georgia. Union Dry Goods Co. v. Public Service Corp., 142 Ga. 841, 83 S. E. 946, L. R. A. 1916E, 358.

Maryland. Yeatman v. Towers, 126 Md. 513, 95 Atl. 158.

Missouri. State v. Geiger, 246 Mo. 74, 154 S. W. 486, L. R. A. 1916A, 1060.

Nebraska. McCook Irrigation & W. P. Co. v. Burtless, 98 Neb. 141, 152 N. W. 334, L. R. A. 1915D, 1205, P. U. R. 1915C, 587.

Texas. Southwestern Tel. & Tel. Co. v. Dallas (Tex. Civ. App.), 131

S. W. 80, 104 Tex. 114, 134 S. W. 321.

West Virginia. Benwood v. Public Service Com., 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261.

Wisconsin. Minneapolis, St. P. & S. S. M. R. Co. v. Menasha Wooden Ware Co., 159 Wis. 130, 150 N. W. 411, L. R. A. 1915F, 732.

³⁹ Illinois. Hite v. Cincinnati, Indianapolis & W. R. Co., 284 Ill. 297, 119 N. E. 904.

Massachusetts. Arlington Board of Survey v. Bay State St. R. Co., 224 Mass. 463, 113 N. E. 273.

Missouri. State v. Geiger, 246 Mo. 74, 154 S. W. 486, L. R. A. 1916A, 1060.

New Jersey. Erie R. Co. v. Public Utility Comrs., 89 N. J. L. 57, 98 Atl. 13.

United States. Chicago & Alton R. Co. v. Traubarger, 238 U. S. 67, 35 Sup. Ct. 678, 59 L. ed. 1204; Louisville & N. R. R. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 57 L. ed. 297, 34 L. R. A. (N. S.) 671; Portland R. L. & P. Co. v. R. R. Com., 229 U. S. 397, 33 Sup. Ct. 820, 57 L. ed. 1248; Hudson Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. ed. 828, 14 Ann. Cas. 560; Puget Sound

Under a law declaring that "when water shall be taken by private individuals from any water works not owned by the city, the mayor and common council shall have the right, by ordinance, from time to time, to fix rates to be charged therefor," it is elemental that a public water company is to be held to have contracted with the city "with full imputed knowledge of, and subject in all ways to all of the powers and restraints connoted" by the law, and that it is bound thereby just as fully as if the provisions of the law were written at large in its franchise contract with the city, and therefore, no reduction of rates would amount to a violation of the obligation of a special contract between the water company and a consumer who stands in exact equality with the other consumers. But it has been ruled that an independent contract of a public utility (which has a franchise contract with the city to furnish water to its inhabitants) to furnish water at higher rates to a consumer outside of the city limits, running for a limited and reasonable term, based upon a valuable consideration, not paid by city consumers in which the consumer does not reserve to himself any right of regulation and is not authorized by any statute to regulate rates, is not abrogated or impaired by the extension of the city limits so as to include such consumer.⁴⁰

A reservation in the constitution or a statute to regulate rates in force when the contract as to rates was made, operates so that no impairment occurs on a change of rates.⁴¹

Traction, etc., Co. v. Reynolds, 223 Fed. 371.

Washington. State ex rel. v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913C, 78.

⁴⁰ State ex rel. v. Eastin, 270 Mo. 193, 202-209, 192 S. W. 1006, overruling State ex rel. v. Geiger, 246 Mo. 74, 154 S. W. 486, L. R. A. 1916A, 1060.

⁴¹ Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, affirming 186 Fed. 176; Pocatello v. Murray, 21 Idaho 180, 120 Pac. 812, affirmed 226 U. S. 318, 57 L. ed. 239; State v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; Arkadelphia El. Light Co. v. Arkadelphia, 99 Ark. 178, 137 S. W. 1093; Iowa Ry. & Light Co. v.

§ 1737a. Same—power of state to change rates fixed by municipal grant and franchise.⁴²

Where a city granted a telephone franchise and limited therein the rates to be charged for service, and subsequently the state enacted a public service commission law to regulate the service and rates of all public utilities operating in the state, the commission created by such act and vested with such power, it was held, could change the rates specified in such franchise, by increasing or lowering them without impairing the obligation of a contract. The state in the enactment of the regulatory statute merely exercised its undoubted police power, an attribute of sovereignty, and this possibility was necessarily implied in the terms of the franchise.⁴³

Jones Auto Co., 182 Iowa 982, 164 N. W. 780.

⁴² In one sense an ordinance embodying a municipal consent upon certain terms to a franchise, whether the general franchise to be a corporation or the special franchise to use the public streets, may be called a contract, accurately enough for practical purposes, since it constitutes an enforceable agreement. It is, however, ordinarily an agreement of a peculiar kind. "The truth is an ordinance of this kind is a grant upon condition rather than a contract." In that case it was held that the public utility commission had power to increase rates. *Collingswood Sewerage Co. v. Collingswood*, 92 N. J. L. 509, 102 Atl. 901.

⁴³ "If the franchise is deemed to be a contract between the city and the telephone company, then the mere fact that it was made prior to the enactment of the public utility statute and before the state attempted to regulate the rates, does not debar the state from increasing

rates fixed in the contract between the parties, for the reason that the law wrote into a stipulation by the city that the state could, at any time, exercise its police powers and change the rates; and therefore, when the state does exercise its police power it does not work an impairment of any obligation of the contract. The immediate parties to the franchise must contract with reference to the right of the government to exercise its inherent authority. The government cannot by contract forestall the resuscitation of a dormant police power by the government; and therefore unless the state actually divested itself of the right to exercise its police power, the agreement by which the city and company specified the rates was made subject to the right of the state to change them." *Woodburn v. Public Service Commission*, 82 Or. 114, 161 Pac. 391, L. R. A. 1917C, 98, Ann. Cas. 1917E, 996.

A like case is *Fulton v. Public Service Com.*, 275 Mo. 67, 71, 204

§ 1737b. Same—same—rates as condition to local consent to operate in streets.

Many constitutions forbid the legislature from granting the right to construct and operate a street railroad within any city, town, village, or in any public highway, but require as a condition to such construction and operation, the consent of the local authorities having control of the street or highway proposed to be occupied by such railroad.⁴⁴

Notwithstanding such provision, it has been expressly held in Missouri that after the consent of the local authorities has been given to the construction of a street railroad on the express condition that specified rates of fare should be charged, it was within the power of the legislature to confer authority upon a state commission to increase or decrease the rates of fare fixed in the municipal grant or franchise by formal ordinance accepted by the company. The constitutional grant to the municipality to give or withhold its consent was held, in effect, not to include the condition as to rates of fare, since such condition in the franchise ordinance is held subject to the state's police power which by express constitutional mandate cannot in any manner be abridged. Whether the power to impose the condition as to rates emanated from the constitution, the municipal charter giving the city control over its streets within its limits, or from the public policy of the state the court did not determine.

It was recognized that the municipality had the absolute and exclusive authority to grant or withhold its con-

S. W. 386, approving *State ex rel. v. Public Service Com.*, 275 Mo. 201, 204 S. W. 497, and overruling *State ex rel. v. Laclede Gaslight Co.*, 102 Mo. 472, in so far as it conflicts with the latter case.

Statute empowering a city to grant a street railway franchise by ordinance only is not authority to prescribe rates of fare that cannot

be changed (increased) thereafter by the state by a public service commission. *Denver & South Platte Ry. Co. v. Englewood*, 62 Colo. 229, 161 Pac. 151, P. U. R. 1916E, 134, 4 A. L. R. 956, following *Home Telegraph & Telephone Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176.

⁴⁴ Section 185, ante.

sent to construct and operate the railroad; that the police power is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden by the constitution, but it was held that the provision of the constitution as to local consent had no application. The constitutional provision as to consent, it was held, did not confer authority upon the city to prescribe the terms and conditions upon which the street railroad might be constructed and operated, much less the power to fix the fares. The court declined to rule that the city in giving such consent might, as a condition, prescribe the fares to be charged, but stated that the law so far declared in Missouri was that because the city could altogether deny a street railroad company the right to operate its roads within the corporate limits the city had the right to dictate the terms and conditions upon which the road should be operated. The court declared that no decision had gone further. However, it was pointed out that the power to dictate the terms and conditions is not conferred by the constitution, relating to giving consent, but rests upon the ground that because the city had the absolute and exclusive right to exclude the roads from the city entirely it might admit them upon such terms and conditions as it deemed proper; that the greater power to exclude them included the incidental right to admit them upon such terms and conditions as it deemed best. The power to refuse to grant permission to construct and operate upon the streets includes the power to refuse the grant unless the company agrees to transport passengers for certain fares. Finally, the provision of the constitution as to consent has not abridged the police power of the state and prevented the legislature from fixing fares to be charged by street car companies in municipalities.⁴⁵

In a New Jersey case the question was whether an ordinance accepted by a railway company made a contract which the state could not thereafter control by the board

⁴⁵ St. Louis v. Public Service Commission, 276 Mo. 509, 207 S. W. 799, followed in Kansas City v. Public Service Commission, 276 Mo. 539, 210 S. W. 381, P. U. R. 1919D, 422.

of public utility commissioners. The elemental rule was invoked that the state retains all sovereign power except so far as it has been by unmistakable language entrusted to others. It was affirmed that the constitution of New Jersey did not grant to municipalities the power to confer street franchises; that the sovereignty of the state in this respect has been kept unimpaired; and that the state has never parcelled out the sovereign powers among minor political subdivisions. It was conceded that the legislature might entrust to municipal corporations authority to make irrevocable contracts: "but the courts ought to be, as they have been, astute to see that such powers are not unnecessarily extended by implication." It is well settled "that a power to fix rates may be delegated to the municipality, and that rates so fixed may amount to an irrevocable contract, binding future legislatures," but in such case all doubts must be resolved in favor of the continuance of the power in the state.

The court found that there was no express power granted to the municipality to fix rates or to contract as to rates. "The power is implied from the power to grant or refuse consent to a location of tracks and to impose lawful restrictions." Even the implied power of the municipality to contract, the court declared, was under the statute limited. It is implied from the power to impose restrictions, but the statute requires that the restrictions be lawful, and they must, like all provisions of municipal ordinances, be reasonable. Not only must the restrictions be reasonable; they must be lawful. The court concluded that notwithstanding the ordinance the board had power to regulate rates of fare.⁴⁶

In Utah, it was held that, while the passing of a franchise ordinance fixing the fares and their acceptance by the utility constituted a contract between the municipality and the utility, it was within the power of the legislature to authorize a state commission to change the fares;

⁴⁶ Atlantic Coast El. Ry. Co. v. Board of Public Utility Comrs., 92 N. J. L. 168, 104 Atl. 218.

and that a constitutional provision by which the local authorities are given the exclusive right to permit or to refuse permission to street railway companies to construct and operate street cars within the cities did not prevent the state through its legislature from exercising its sovereign prerogative to regulate and change the fares fixed in a franchise ordinance.⁴⁷

In Illinois, it was held that the state may change rates fixed by a franchise ordinance. Thus in that state, the utilities commission may fix a street car rate in excess of that fixed in the franchise ordinance for a period of twenty years, under which the city granted the railway company the right to operate its railroad upon the public streets of the city. The reasons given were: (1) The power to fix rates is inherent in the state, (2) the state had never granted to the city the power to fix rates, (3) when the state granted to the city the right to regulate and control by ordinance the operation of street railways in its streets, it retained its police power which it could not abdicate or bargain away, (4) all contracts whether made by the state, municipality, private corporation or an individual are made subject to police power, and (5) the city never had power to fix by contract street car fares for a definite period. As to the provision of the constitution requiring consent of local authorities to construct and operate street railways, and forbidding the exercise of such power by the legislature, it was said that it is merely a limitation of the general powers of the legislature, and in one particular only. The section "does not, by implication or otherwise, attempt to divest the state of its paramount authority and control of streets and highways."⁴⁸

It is sometimes urged that the "franchise and the conditions upon which the consent of the local authorities

⁴⁷ Salt Lake City v. Utah Light & Traction Co. (Utah 1918), 173 Pac. 556, P. U. R. 1918F, 377.

⁴⁸ State Public Utilities Com. v. Quiney (Ill. 1919), 125 N. E. 374,

376; Public Utilities Com. v. Chicago & West Towns Ry. Co., 275 Ill. 555, 570, 114 N. E. 325, 330, Ann. Cas. 1917C, 50; Chicago v. O'Connell, 278 Ill. 590, 116 N. E. 210.

are obtained are inseparable; that the very right of the railroad to operate depends upon its compliance with the obligation to keep such conditions, that it would be a vain thing if the consent were placed under the protection of the constitution, and the conditions which induced such consent were immediately subjected to extinguishment by the legislature for that would mock the very purpose of the constitutional provision and permit almost any interference by the legislature; that the local authorities in this matter are supreme over the public service commission by virtue of the constitution; that the obligation of a street surface railroad to carry passengers for an agreed fare may, in a constitutional sense be neither a contract nor private property, but it is imposed by virtue of a delegated power, delegated by the people—not by the legislature—to the local authorities, and is thus beyond legislative recall; that when any right is expressly protected by the constitution, the police power may not be exercised to impair its validity; and that the public service commission, therefore, has no jurisdiction over the subject-matter of rate regulation, in the city, because the legislature has no power to alter the rates fixed by consent of the company and the local authorities.” In the New York case, in which the above argument was made, the question presented was: The consent of the local authorities being obtained, what jurisdiction has the legislature conferred upon the public service commission to regulate rates by increasing the rate agreed upon without such consent? The court deemed it unnecessary, and therefore improper, to decide in the case presented what the limits of legislative power were as applied to the facts of the case. “In the absence of clear and definite language conferring without ambiguity jurisdiction upon the public service commission to increase rates of fare agreed upon by the street railroad and the local authorities we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter whatever its powers may be.” The laws “deal with maximum rates of fare established by statute but make no

reference in terms of rates established by agreement with local authorities." The court further said that it was impossible to find a word in the statutes which discloses the legislative intent to deal with the matter of rates fixed by agreement with local authorities. "The authority of the commission to regulate rates in such cases and thus to extinguish an undoubted power of the local authorities should fairly appear before it is assumed to exist." In brief, the gist of the decision is that the legislature had not in the given instance conferred upon the public service commission the power of regulation of rates in such cases. But that power to change the rates could not be conferred upon the commission is clearly intimated in the following language: "Our constitution by requiring the consent of the local authorities recognizes that our municipalities are pro tanto independent of legislative control, exercising some fragment of power, otherwise legislative in character, which has been thus irrevocably transferred by the fundamental law from the legislature to the locality. The grant by the municipality of authority to use the streets is not a mere privilege or gratuity. Once accepted, it becomes a contract which neither the state nor its agencies can impair."⁴⁹

§ 1738. Same—power of municipality to make contract as to rates.⁵⁰

It is well settled by decisions of the Supreme Court of the United States that a municipal corporation cannot

⁴⁹ *Quincy v. Public Service Commission*, 223 N. Y. 244, 262-264, 119 N. E. 433.

⁵⁰ *Collingswood Sewerage Co. v. Collingswood*, 92 N. J. 509, 102 Atl. 901; *San Francisco-Oakland Terminal Rys. Co. v. Alameda*, 226 Fed. 889; *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; *Wichita Water Co. v. Wichita*, 234 Fed. 415, 422; *Bessemer v. Besse-*

mer City Water Works, 152 Ala. 391, 44 So. 663; *Atlantic Coast El. Ry. Co. v. Public Utilities Comrs.*, 89 N. J. L. 407, 99 Atl. 395; *Virginia-Western Power Co. v. Commonwealth* (Va. 1919), 99 S. E. 723, 732, citing § 1738, vol. 4, ante.

"When a city has entered into a binding contract with a public utility fixing rates for a definite period it surrenders for the duration of the contract its govern-

barter away the police power of the state by unalterably fixing rates and fares during the life of a franchise, unless specifically and expressly authorized so to do by the supreme legislative authority of the state.⁵¹

"That a city, acting under state authority, may in matters of proprietary right make binding contracts of the nature contained in these ordinances (as to rates) is well established by the adjudications of this court." On acceptance of the ordinance it becomes a binding contract, governed by the rates of fare authorized to be charged during the life of the ordinance and the rates contracted for became binding on the city and could not be altered by subsequent municipal legislation or action consistently with the constitutional rights of the railway company.⁵²

"The fixing of rates which may be charged by public service corporations is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciations of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit no doubt as to their proper construction."⁵³

mental function of rate regulation so far as altering the contract rates is concerned." State ex rel. v. Billings Gas Co. (Mont. 1918), 173 Pac. 799, citing Detroit v. Detroit Citizens St. R. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592.

Special rate to state normal school on consideration of it locating in the city, held void as not a legitimate municipal purpose. Eastern Illinois State Normal School v. Charleston, 271 Ill. 602, 111 N. E. 573, affirming 193 Ill. App. 600.

⁵¹ Puget Sound T., L. & P. Co. v. Reynolds, 223 Fed. 371, 375 (following Home Telephone Co. v. Los

Angeles, 211 U. S. 265, 272, 29 Sup. Ct. 50, 51, 53 L. ed. 176, and Portland Ry. L. & P. Co. v. Portland, 201 Fed. 119, affirmed in 210 Fed. 667, 670), affirmed in 244 U. S. 574, 579, 61 L. ed. 1325.

⁵² Columbus Ry. Power & Light Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 351, 352, following Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; Detroit United R. R. v. Michigan, 242 U. S. 238, 248, 61 L. ed. 268.

In granting right to use streets, power to stipulate as to rates as a condition. 7 Fletcher, Cyc. Corp., § 4473.

⁵³ Per Mr. Justice Day in Mil-

Therefore, power conferred upon a municipality to grant permission to construct and operate railways in its streets "upon such terms as the proper authorities may determine," is not power to contract as to rates of fare so as to preclude state interference through the legislature or a public service commission.⁵⁴

So a municipality has no implied power to grant a franchise or to enter into an agreement fixing telephone rates by reason of its ownership and control of streets, alleys and public grounds, and by reason of power to contract. Whatever contract made by the city and the telephone company in behalf of telephone users was, and must necessarily have been, made subject to the legislative right of regulation. The courts therefore will not hold that exclusive power to contract exists unless plainly and expressly granted.⁵⁵

waukee El. Ry. & L. Co. v. Railroad Commission, 238 U. S. 174, 180, 59 L. ed. 1254, affirming 153 Wis. 592, 142 N. W. 491, L. R. A. (N. S.) 1915F, 744, Ann. Cas. 1915A, 911.

⁵⁴*Milwaukee El. Ry. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, affirming 153 Wis. 592, 142 N. W. 491, L. R. A. (N. S.) 1915F, 744, Ann. Cas. 1915A, 911. Compare cases in § 1738, vol. 4, ante.

Unless clearly authorized a municipality cannot by contract with a public utility fix rates for a definite period so as to preclude the state from exercising its power to regulate. *State ex rel. Billings v. Billings Gas. Co.*, 55 Mont. 102, 173 Pac. 799.

In granting the franchise to use the streets with power to impose reasonable conditions the conditions may include the condition that the city may fix the rates; and when the public service corpora-

tion accepted the franchise it submitted to and was bound by the condition. *Charleston Consol. Ry. & Lighting Co. v. Charleston*, 92 S. C. 127, 75 S. E. 390, approving principle recognized in *South Bound Ry. Co. v. Burton*, 67 S. C. 515, 46 S. E. 340.

"The municipal authorities in this state have never been clothed with power to fix by binding contracts, rates for any definite term of years." *State Public Utilities Com. v. Quincy* (Ill. 1919), 125 N. E. 374, 376, following *Danville Water Co. v. Danville*, 186 Ill. 326, 57 N. E. 1129, and *Freeport Water Co. v. Freeport*, 186 Ill. 179, 57 N. E. 862, which were approved by the United Supreme Court in 180 U. S. 619, 21 Sup. Ct. 505, 45 L. ed. 696, and 180 U. S. 587, 21 Sup. Ct. 493, 45 L. ed. 679.

⁵⁵*Marguis v. Polk County Telephone Co.*, 100 Neb. 140, 158 N. W. 927; *McCook Irrigation & Water Power Co. v. Burtless*, 98 Neb. 141,

§ 1739. Same—whether provision in contract actually fixes rates.⁵⁶

§ 1740. Regulating rates outside municipality.⁵⁷

In granting a franchise to use streets to a street railway or interurban line, a municipality may make a particular rate as a condition, although the rate covers in part points outside the corporate limits.⁵⁸

§ 1741. Company as precluded from denying power of municipality to contract as to rates or attacking reasonableness of rates.

“The presumption is that the rates specified in the contract are reasonable.” In that case the ordinance pro-

152 N. W. 334, L. R. A. 1915D, 1205; *Benwood v. Public Service Com.*, 75 W. Va. 127, 83 S. E. 295, L. R. A. (N. S.) 1915C, 261, 264, note; *Milwaukee El. Ry. & Light Co. v. R. R. Com.*, 153 Wis. 592, 142 N. W. 492, L. R. A. 1915F, 744, Ann. Cas. 1915A, 911; *Kenosha v. Kenosha Home Tel. Co.*, 149 Wis. 338, 135 N. W. 848; *Wyandotte County Gas Co. v. Kansas*, 231 U. S. 622, 34 Sup. Ct. 226, 58 L. ed. 404, affirming 88 Kan. 165, 127 Pac. 639.

If the state has not exercised the power or does not attempt to do so, “the municipality and the street railway might enter into a contract upon this subject (rates) that will be valid; but the right of the municipality to refuse absolutely its consent to the construction of a street railway within its limits, and the constitutional and statutory provisions in regard thereto, strengthen us in the view that it is competent for the municipality and the street railroad

company to enter into a contract on this subject.” *Georgia Ry. & Power Co. v. Georgia Railroad Com.* (Ga. 1919), 98 S. E. 696, 699.

⁵⁶ *Collingswood Sewerage Co. v. Collingswood*, 92 N. J. L. 509, 102 Atl. 901.

⁵⁷ *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301.

⁵⁸ *Massachusetts. Westwood v. Dedham & F. St. R. Co.*, 209 Mass. 213, 95 N. E. 81.

Michigan. Vining v. Detroit Y. A. A. & J. Ry. Co., 133 Mich. 539, 95 N. W. 542; *Coy v. Detroit Y. & A. A. Ry.*, 125 Mich. 616, 85 N. W. 6.

New Jersey. Atlantic Coast El. R. Co. v. Public Utility Comrs., 89 N. J. L. 407, 99 Atl. 395.

New York. Public Service Com. v. Westchester St. R. Co., 206 N. Y. 209, 99 N. E. 536.

Wisconsin. Manitowoc v. Manitowoc & N. T. Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056.

vided that the rates should be reasonable, and the council reserved the right to regulate them if at any time excessive rates should be charged, and the contract reserved a similar right if the rates at anytime exceeded those specified therein.⁵⁹

c. Mode of Fixing Rates.

§ 1742. Manner of fixing rates by municipality.⁶⁰

d. Reasonableness of Rates.

§ 1744. Rates must be reasonable.

Rates when not a matter of contract must be reasonable.⁶¹ Independent of statute, contract or municipal

⁵⁹ Belle Plaine Borough v. Northern Power Co. (Minn. 1919), 172 N. W. 217, quoting with approval from § 1741, vol. 4, ante.

⁶⁰ Rate agreement by city and utility. State ex rel. v. Water, Light & Transit Co., 249 Mo. 649, 155 S. W. 826.

By ordinance. Home Telephone Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301; Joplin v. Wheeler, 173 Mo. App. 590, 158 S. W. 924.

"The rates charged by a public service corporation for service furnished to the inhabitants of a municipality may be regulated by contract as well as by ordinance. * * * The only distinction between the power to regulate rates by ordinance and by contract is that the former calls for the exercise of a governmental function, and the latter for the exercise of the business or proprietary powers of the municipality. The first requires the consent of only one

body; the second, consent of two bodies. * * * In the latter case the municipality fixes rates as effectually as in the former, and the grantee of the franchise is not in a position to assert that the rates should have been regulated by ordinance instead of by contract." Re Stees (Minn. 1919), 172 N. W. 217, 219, citing § 1741, vol. 4, ante.

⁶¹ Home Telephone Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301; Joplin v. Wheeler, 173 Mo. App. 590, 158 S. W. 924; Newark Natural Gas & Fuel Co. v. Newark, 92 Ohio St. 393, 111 N. E. 150; Hocking Valley R. Co. v. Ohio Public Utility Com., 92 Ohio St. 362, 110 N. E. 521; Cedar Rapids Gas Co. v. Cedar Rapids, 144 Iowa 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299; Southwestern Telegraph & Tel. Co. v. Dallas (Tex. Civ. App.), 131 S. W. 80.

regulation, the rate fixed by a public service corporation or a municipality owning its own plant must be reasonable.⁶² "It is too plain to require statement that a rate may be unjust and unreasonable because too low, as well as because too high; the statute aims to secure justice on both sides."⁶³

As "reasonable" is a relative term, whether a given rate is reasonable or unreasonable depends on the particular circumstances of each case.⁶⁴ "A rate that is confiscatory or insufficient to pay costs of the traffic and other proper outlays for taxes, etc., and to return to the carrier a reasonable profit on the investment, infringes upon the constitutional rights of the carrier by depriving it of property without due process of law and is void whether fixed by the statute itself or by the commission."⁶⁵

§ 1745. Rates fixed by the municipality presumed to be reasonable.⁶⁶

⁶² Section 1698B, ante.

⁶³ Collingswood Sewerage Co. v. Collingswood, 92 N. J. L. 509, 102 Atl. 901, 903.

⁶⁴ Rowland v. Boyle, 244 U. S. 106, 37 Sup. Ct. 577, 61 L. ed. 1022, affirming 222 Fed. 539; Northfolk & W. R. Co. v. Couley, 236 U. S. 605, 59 L. ed. 745.

Rates fixed by public service commission are presumed reasonable. Puget Sound Traction, etc., Co. v. Reynolds, 223 Fed. 371, 376.

Telephone rates for business purposes. Marguis v. Polk County Tel. Co., 100 Neb. 140, 158 N. W. 927.

⁶⁵ Public Utilities Com. v. Chicago & West Towns Ry. Co., 275 Ill. 555, 114 N. E. 325, 330, Ann. Cas. 1917C, 50.

⁶⁶ Tipton v. Tipton Light and

Heating Co., 176 Iowa 224, 227, 157 N. W. 844.

Where the rates have been fixed by the municipality pursuant to clear grant of power by the legislature, its action is a proper exercise of legislative power. Rate-making is a legislative function whether exercised by the legislature or by a subordinate body such as a municipality to which power has been delegated. Therefore, "the company assailing the rates fixed in such manner must show that their enforcement will result in the taking of its property without just compensation." Newark Natural Gas & Fuel Co. v. Newark, 92 Ohio 393, 111 N. E. 150, 152, affirming 3 Ohio App. 383, 35 Ohio Cir. Ct. R. 94, following Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371;

§ 1746. How far rates subject to review by courts.⁶⁷

The reasonableness of rates is a judicial question.⁶⁸

The "right to a judicial determination exists whether the deprivation is by a rate statute—passed without a hearing * * * or by administrative orders of a commission made after a hearing. For rate made by the general assembly or administrative orders made by a commission are both legislative in their nature (citations) and a party affected by such legislative action is entitled by the due process clause to a judicial review of the question as to whether he has been thereby deprived of a right protected by the constitution." ⁶⁹

Concerning the power of the judiciary to review rates established, these propositions are settled:

1. A court has jurisdiction to ascertain their reasonableness, at least to the extent of determining whether the rates are confiscatory or deprive the company of its property without due process of law.

2. Rates fixed by law are presumed reasonable, and he who asserts the contrary must establish it by satisfactory evidence.⁷⁰

Wilcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 52 L. ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134, and *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081.

⁶⁷ *Marguis v. Polk County Tel. Co.*, 100 Neb. 140, 158 N. W. 927; *Newark Natural Gas and Fuel Co. v. Newark*, 92 Ohio 393, 111 N. E. 150; *Union v. Sartor*, 91 S. C. 248, 74 S. E. 496.

⁶⁸ *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. ed. 1154; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 397, 38 L. ed. 1014; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 461, 33 L. ed. 970, 983; *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307,

331, 29 L. ed. 636, 644; *State ex rel. v. Public Service Com.*, 275 Mo. 201, 204 S. W. 497.

⁶⁹ *Wadley v. Southern R. Co. v. Georgia*, 235 U. S. 651, 660, 59 L. ed. 405.

⁷⁰ *Darnell v. Edwards*, 244 U. S. 564, 569, 61 L. ed. 1317; *Railroad Commission v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 53 L. ed. 577; *Hooker v. Interstate Commerce Commission*, 188 Fed. 242; *State v. Northern Pac. R. Co.*, 26 N. D. 438, 145 N. W. 135; *State Public Utilities Commission v. Chicago & W. T. R. Co.*, 275 Ill. 555, 571, 114 N. E. 325, Ann. Cas. 1917C, 50.

Burden on company to show that the contract rates are so low that the refusal of the municipality to

3. Judicial interference is sanctioned only where the evidence demonstrates that the rates involved are clearly, palpably and grossly unreasonable.⁷¹

4. A finding that the rates are unreasonable will not authorize the court itself, to fix other rates, unless the power to do so is given by statute.⁷²

Undoubtedly a court may enjoin the enforcement of an unreasonable or confiscatory rate, or one discriminatory in violation of law, or one plainly violative of a provision of the state or federal constitution.⁷³

§ 1747. Court cannot fix rates.

As the regulation and fixing of rates is a legislative function,⁷⁴ courts have no power to fix rates unless the power is given by statute,⁷⁵ or where a court by virtue of express statutory grant has power to review rate regulations.⁷⁶

sanction an increase would amount to depriving it of its property without due process of law. *Re Stees* (Minn. 1919), 172 N. W. 217, 218, citing § 1746, vol. 4, ante.

If rates are attacked as unjust the utility has the burden to show the rates are reasonable and just and not excessive. *Public Utilities Com. v. Chicago & West Towns Ry. Co.*, 275 Ill. 555, 114 N. E. 325, 330, Ann. Cas. 1917C, 50.

⁷¹ *Missouri Rate Cases*, 230 U. S. 474, 57 L. ed. 1571; *Allen v. St. Louis, I. M. & S. R. Co.*, 230 U. S. 553, 560, 57 L. ed. 1625.

In event of doubt the court will decline to act. *Louisville & Nashville R. Co. v. Railroad Commission*, 208 Fed. 35, 42.

In case of doubt a practical trial should be given. *Pennsylvania R. Co. v. Public Service Commission*, 126 Md. 59, 80, 94 Atl. 330, Ann. Cas. 1917B, 1144.

⁷² Section 1647, post.

⁷³ Bill to restrain city from enforcing provision of franchise ordinance as to rate of service. *Columbus Ry. Power & Light Co. v. Columbus*, 249 U. S. 399, 39 Sup. Ct. 349.

⁷⁴ *Western Union Tel. Co. v. Myatt*, 98 Fed. 335.

Section 1746, ante.

⁷⁵ *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. ed. 568; *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 53 L. ed. 150; *Montana W. & S. R. Co. v. Morley*, 198 Fed. 991; *Pacific Gas & El. Co. v. San Francisco*, 211 Fed. 202; *Seward v. Denver & R. G. R. Co.*, 17 N. Mex. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242; *Pioneer Telegraph & Tel. Co. v. Bartlesville*, 40 Okl. 583, 139 Pac. 694.

Statute creating court of visitation; constitutionality of statute. *State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. E. A. 662.

⁷⁶ *Pioneer Tel. & Tel. Co. v.*

Without express power a court cannot revise or modify an order of a commission fixing rates, but must either set it aside or affirm the order in toto.⁷⁷

§ 1748. Matters to be considered in determining reasonableness of rates.⁷⁸

§ 1748a. Same—methods of valuation.

Three theories of valuation are in vogue: (1) The original cost plus subsequent expenditures which is termed the investment theory; (2) The present value; and (3) The cost of reproduction.

These several methods of valuation, however, merely constitute evidence to be considered with all other relevant facts, in determining the fair value of the property used and useful in the supply of the service.⁷⁹

§ 1749. Same—reasonableness as looked at from different standpoints of patron and company.⁸⁰

§ 1750. Same—present value of property at test.⁸¹

“The basis of calculation is the ‘fair value of the property’ used for the convenience of the public.”⁸²

Bartlesville, 40 Okl. 583, 588, 139 Pac. 694.

⁷⁷ Erie R. Co. v. Public Utility, 90 N. J. L. 271, 100 Atl. 346, reversing 87 N. J. L. 438, 95 Atl. 177.

⁷⁸ Newark Natural Gas and Fuel Co. v. Newark, 92 Ohio 393, 111 N. E. 150.

⁷⁹ Grafton County El. L. & P. Co. v. State, 78 N. H. 330, 100 Atl. 668.

“Fundamental principles of valuation of public service property,” note L. R. A. 1916F, 599.

⁸⁰ Puget Sound El. Ry. v. Railroad Commission, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763; People v. Public Service Com., 145

N. Y. S. 503, 159 App. Div. 531, 538.

⁸¹ Darnell v. Edwards, 244 U. S. 564, 568, 61 L. ed. 1317, affirming 209 Fed. 99; Public Service Gas Co. v. Public Utility Comrs., 84 N. J. L. 463, 87 Atl. 651; Goldfield Consol. Water Co. v. Public Service Com., 236 Fed. 979; Bonbright v. Geary, 210 Fed. 44; Home Tel. Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301.

Note L. R. A. 1916F, 599, 631-663.

⁸² Simpson v. Shepard, 230 U. S. 352, 434, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

Whether net profits will produce

§ 1753. Cost of reproduction as test.⁸³

The cost of reproduction is of service in ascertaining the present value.⁸⁴

Although not conclusive, it is one of various factors that may be, and often is, taken into consideration in determining the valuation.⁸⁵

It is sometimes said that this theory is at present the most generally accepted basis of valuation.⁸⁶

“Construing the word ‘basis’ to mean simply a funda-

a reasonable return upon the value of the gas plant which is employed for the public service at the date of the investigation and inquiry. There should be a fair return on the reasonable value of the property at the time it is being used. *Newark Natural Gas & Fuel Co. v. Newark*, 92 Ohio 393, 111 N. E. 150, 152, 153, following *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 19 Sup. Ct. 192, 53 L. ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134; *Lincoln Gas & Elec. Light Co. v. Lincoln*, 182 Fed. 926, and *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081.

⁸³ “Cost of reproduction means the cost which will be necessarily incurred by a reasonably prudent and careful man, using ordinarily careful business methods, in reproducing a plant of equal efficiency.” *Appleton Water Works Co. v. Railroad Commission*, 154 Wis. 121, 139, 140, 142 N. W. 476, 47 L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160.

⁸⁴ *Minnesota Rate Cases*, 230 U. S. 352, 59 L. ed. 1511, 48 L. R. A.

(N. S.) 1151, Ann. Cas. 1916B, 18.

⁸⁵ *United States. Minnesota Rate Cases*, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916B, 18.

Florida. State v. Louisville & Nashville R. Co., 62 Fla. 315, 57 So. 175.

Minnesota. Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 72 N. W. 713.

Oklahoma. Pioneer Telephone & Tel. Co. v. Westhaver, 29 Okl. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209.

This has been universally recognized not as fixing the present physical value of the property or the business, but only as an important and helpful consideration which may throw much light on the question. It has the advantage of comparative ease and certainty of ascertainment.” *Appleton Water Works Co. v. Railroad Commission*, 154 Wis. 121, 146, 146 N. W. 476, 47, L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160.

⁸⁶ *Whitten, Valuation of Public Service Corporations*, § 639.

It is the “most reliable test ordinarily.” *Louisville & Nashville R. Co. v. Railroad Commission*, 196 Fed. 800, 820.

mental fact or starting point not in any sense exclusive or controlling, the statement seems to be substantially correct. Important as it may be, however, this physical valuation so obtained is but one of the numerous facts to be considered in reaching the final result."⁸⁷

However, many courts have sanctioned this method of valuation, and it has been stated that perhaps it is the best general method yet devised, although it cannot be applied in all cases and under all conditions, since to do so would result in ignoring certain important elements of value.⁸⁸

Undoubtedly in many instances the reproduction theory is the best method to fix the present value, and in other instances the most deceptive.⁸⁹

Various factors such as original cost, present value, and cost of reproduction should all be taken into account in reaching the sum upon which a public service company is entitled to earn a reasonable return.⁹⁰

If the valuation is based on the cost of reproduction, less depreciation, it is sometimes held that the cost of taking up and replacing pavements, for example, to install pipes, should not be included where the pipes are placed prior to any pavements.⁹¹

§ 1756. Value as "going concern."⁹²

⁸⁷ Appleton Water Works Co. v. Railroad Commission, 154 Wis. 121, 146, 147, 142 N. W. 476, 47 L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160.

⁸⁸ Ann Arbor R. Co. v. Fellows, 236 Fed. 387, 391; Murray v. Public Utilities Commission, 27 Idaho 603, 150 Pac. 47, L. R. A., 1916F, 756.

⁸⁹ Des Moines Gas Co. v. Des Moines, 199 Fed. 204, 207, 209; Minnesota Rate Cases, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

⁹⁰ Note L. R. A. 1916F, 599, 611, 603-678.

⁹¹ Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 171, 59 L. ed. 1244, affirming 199 Fed. 204, 207; Cedar Rapids Gas Light Co. v. Cedar Rapids, 144 Iowa 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299.

⁹² Overhead charges, in ascertaining valuation on reproduction theory, less depreciation. Bonbright v. Geary, 210 Fed. 44, 54; note 48 L. R. A. (N. S.) 1037.

⁹³ Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, affirming 199 Fed. 204; London v. Public Utilities Com., 242 Fed. 658, 671; Public Service Gas

§ 1757. Good will as item of value.⁹³

"Good will" in the sense in which that term is generally employed as indicating that element of value which inheres in the fixed and favorable consideration of patrons arising from an established, well known and successfully conducted business has no place in the fixing of valuation for the purpose of rate-making of public service corporations, such as gas companies. Such is the conclusion of the United States Supreme Court.⁹⁴

§ 1758. Deducting for depreciation.⁹⁵

§ 1761. Capitalization and bonded indebtedness.⁹⁶

§ 1762. What profit deemed reasonable.

"Rates which, with efficient and economical management, yield a return equal to that received in other busi-

Co. v. Public Utility Comrs., 87 N. J. L. 581, 95 Atl. 1079, L. R. A., 1918A, 421; *People v. Willeox*, 210 N. Y. 479, 104 N. E. 911, L. R. A. (N. S.) 1; *Murray v. Public Utilities Com.*, 27 Idaho 603, 150 Pac. 47, L. R. A., 1916F, 756; *Appleton Water Works Co. v. Railroad Commission*, 154 Wis. 121, 146, 142 N. W. 476, 47, L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160.

⁹³ Similar to going value. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081.

Is not to be considered as a distinct element of value. *Des Moines Gas Co. v. Des Moines*, 199 Fed. 204.

Contra. *Metropolitan Trust Co. v. Houston & T. C. R. Co.*, 90 Fed. 683.

⁹⁴ *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 59 L. ed. 1244, modifying 199 Fed. 204.

⁹⁵ *Simpson v. Shepard*, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Murray v. Public Utilities Com.*, 27 Idaho 603, 150 Pac. 47, L. R. A., 1916F, 756; *Miles v. People's Tel. Co.*, 166 Wis. 94, 163 N. W. 652.

See notes in L. R. A., 1916F, 761, 52, L. R. A. (N. S.) 15, 38, L. R. A. (N. S.) 1209.

⁹⁶ Market price of capital stock is no criterion of value. *Simpson v. Shepard*, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

The value of bonds and stocks is wholly unreliable where there are assets and property not devoted to public service. *Minnesota Rate Cases*, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1511, Ann. Cas. 1916A, 18.

ness ventures of similar character and attended with like risks can never be judged to be confiscatory.”⁹⁷

The Kansas statute forbids the regulation of rates which precludes the utility from “earning at least eight per cent on the amount of its actual cash investment.”⁹⁸

Rates permitting earnings equal to the statutory rate of interest are not confiscatory, at least if there are no unusual circumstances.⁹⁹

XIII. REMEDIES.

§ 1767. Remedies of municipality—injunction.

Injunction may be invoked by a municipality to enforce an ordinance limiting street car fares.¹

§ 1770. Remedies of public service company.

Court will declare a franchise invalid at the instance of any person, individual or corporation, who will be specially damaged by the exercise of powers claimed under it, when such franchise was granted under an invalid ordinance. Such a franchise does not give grantee “color of authority” so that the validity thereof can only be inquired into at the instance of the state through its designated law office.²

⁹⁷ Ann Arbor R. Co. v. Fellows, 236 Fed. 387, 390.

⁹⁸ “Cash investment,” held not to exclude sum obtained from excessive rates and reinvested. Garden City v. Garden City T. L. & M. Co., 236 Fed. 693, 696.

⁹⁹ Ann Arbor R. Co. v. Fellows, 236 Fed. 387, 390.

Gas company entitled to seven per cent. St. Joseph Gas Co. v. Barker, 243 Fed. 206.

Gas company given eight per cent. Landon v. Public Utilities Commission, 242 Fed. 658, 673.

Water company, ten per cent after allowing an annual deprecia-

tion charge of three and one half per cent, held not confiscatory. Van Dyke v. Geary, 244 U. S. 39, 48, 61 L. ed. 773, affirming 218 Fed. 111.

¹ Lake Charles v. Lake Charles Ry. L. & W. Co. (La. 1918), 80 So. 260, 262, citing § 1767, vol. 4, ante, and § 806, vol. 2, ante.

² Holding that street railway company could enjoin operation of jitneys where franchise under which such jitneys claimed right to operate was issued under an ordinance which did not bear the mayor's signature attesting his approval, as required by law. Memphis Street Ry. Co. v. Rapid Tran-

§ 1771. Same—suits against competitors attacking their franchises.

The grantee of a valid franchise, it has been held, may enjoin interference with its property rights by a competitor which has not secured a valid grant of right to use the streets.³

§ 1772. Remedies of patrons.⁴

Generally where a patron or consumer asserts discrimination against him in rates fixed by a public service corporation, he must first apply to the appropriate commission under the regulatory statutes rather than to the courts.⁵

sit Co., 138 Tenn. 594, 198 S. W. 890, 892, citing with approval § 1771, vol. 4, ante.

³ If an ordinance purporting to grant a franchise is invalid and does not in fact exist, the courts may so declare at the instance of any person, individual or corporation who would be specially damaged by reason of the exercise of power claimed under it. This position is supported by textwriters, since the franchise (and consequent easement in the street) of the older company constitutes property which, if it stands to suffer special or peculiar damage, will be protected by injunction. *Memphis Street Ry. Co. v. Rapid Transit Co.*, 138 Tenn. 594, 198 S. W. 890, 892, citing § 1771, vol. 4, ante, distinguishing *Memphis Street R. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179 S. W. 635, L. R. A., 1916B, 1143, Ann. Cas. 1917C, 1045, and reaffirming *Patton v. Chattanooga*, 108 Tenn. 220, 221, 65 S. W. 414, 420.

"The cases are in conflict while the textwriters are in agreement." In substance some cases hold that one public utility may not chal-

lenge the authority of a rival to engage in a similar business on the ground that questions relating to the regularity of charters and the validity of franchises are to be challenged alone by the constituted public authority. *Lindsley v. Dallas Consol. S. Ry.* (Tex. Civ. App. 1918), 200 S. W. 207, 210, quoting with approval part of § 1771, vol. 4, ante, and reviewing cases.

Baxter Tel. Co. v. Cherokee, etc., Tel. Assn., 94 Kan. 159, 146 Pac. 324, L. R. A., 1916B, 1083, following *Coffeyville Mining & Gas Co. v. Citizen's Natural Gas and M. Co.*, 55 Kan. 173, 140 Pac. 326, proceeds upon the notion that the complaint of the older company is to prevent competition with the business conducted by it under its franchise, and accordingly denies the right to relief by injunction.

⁴ Where patron or consumer cannot sue to question rates. *St. Paul Book & Stationery Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, L. R. A., 1918A, 384, Ann. Cas. 1916B, 286.

⁵ *State v. Metaine Falls Light & Water Co.*, 80 Wash. 652, 141 Pac. 1142.

CHAPTER 35.

MUNICIPAL OWNERSHIP OF PUBLIC UTILITIES.

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| § 1781. Power of municipality to own and operate public utilities. | § 1795. Procedure to determine whether municipality shall own its own plant. |
| § 1782. Same—waterworks. | § 1796. Special assessments to pay for waterworks. |
| § 1783. Same—light plants. | § 1799. Power of municipality to sell supply for private purposes. |
| § 1784. Same—power to own and operate street railways. | § 1800. Power of municipality to furnish supply outside territorial limits. |
| § 1785. Power to furnish water and light to individuals. | § 1801. Rights, duties and liabilities of municipality as owner of plant. |
| § 1786. Power to construct and operate competing plant. | § 1803. Rates. |
| § 1788. Power to acquire property outside territorial limits. | |
| § 1789. Power to acquire plant of existing company. | |

§ 1781. Power of municipality to own and operate public utilities.¹

¹ Swindell v. Belhaven, 173 N. C. 1, 91 S. E. 369.

Telephone system. Spangler v. Mitchell, 35 S. D. 335, 152 N. W. 339, Ann. Cas. 1918A, 373 (p. 380, annotation).

Legislature may authorize cities to erect and maintain public utilities, as electric light plants, waterworks, etc. Colorado Springs v. Pike's Peak Hydro-Electric Co., 57 Colo. 169, 140 Pac. 921, 927.

State constitution provides that any municipality may acquire, construct or own any public utility the product or service of which is to be supplied to the municipality or its inhabitants. Dravo-Doyle Co.

v. Orrville, 93 Ohio 236, 112 N. E. 508.

State constitution empowers municipalities to establish and operate public works for supplying inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Matter of Russell, 163 Cal. 668, 126 Pac. 875.

Ice plant. Power to establish and maintain an ice plant and a cold storage system may be implied from a provision of the general welfare clause authorizing the city to issue bonds whenever it shall seem proper for the purpose of making any public improvement

§ 1782. Same—waterworks.²

§ 1783. Same—light plants.³

for the benefit of the town. *Saunders v. Arlington*, 147 Ga. 581, 94 S. E. 1022.

Cannot make and sell ice, without charter authority, either express or clearly implied. *State ex rel. v. Orear*, 277 Mo. 303, 316-329, 210 S. W. 392, 395.

Under the Constitution of Louisiana providing that the taxing power may be exercised by municipal corporations for municipal and public purpose "strictly" public in their nature, a city operating a municipal waterworks and an electric lighting system, can not construct and maintain a municipal ice plant by taxation, since this is not strictly a public activity. *Union Ice, etc. v. Ruston*, 135 La. 898, 66 So. 262, Ann. Cas. 1916C, 1274, (p. 1287, annotation).

² *Asbury v. Albermarle*, 162 N. C. 247, 78 S. E. 146; *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239.

Express power. *Public Service Commission v. Helena*, 52 Mont. 527, 159 Pac. 24.

General powers, held ample to authorize a city to construct a system of waterworks. *Hall v. Calhoun*, 140 Ga. 611, 79 S. E. 533.

Municipal ownership of, authorized. *Matthews v. Ellensburg*, 73 Wash. 272, 131 Pac. 839; *Albuquerque v. Water Supply Co.*, 24 N. M. 368, 174 Pac. 217; *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545.

Under statutory authority city may supply water to persons, firms or corporations, without the cor-

porate limits but contiguous thereto. *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545.

³ *Humphreys v. Pratt City Comrs.*, 93 Kan. 413, 144 Pac. 197; *Shorts v. Seattle*, 95 Wash. 538, 164 Pac. 241; *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331.

Municipal lighting and power plant authorized. *Neacy v. Milwaukee*, 151 Wis. 504, 139 N. W. 409; *Bell v. David City*, 94 Neb. 157, 142 N. W. 523.

Gas and electric light plant authorized. *Andrews v. South Haven*, 187 Mich. 294, 153 N. W. 827.

"Express grant of power to light streets carried by necessary implication power to construct or acquire by purchase a lighting plant for that purpose." *Keenan & Wade v. Trenton*, 130 Tenn. 71, 168 S. W. 1053.

In Montana under the general law relating to cities and towns, a city may install at public expense a lighting plant to supply light not only for public buildings and streets, but also for use by its inhabitants. *Milligan v. Miles City*, 51 Mont. 374, 383, 153 Pac. 276.

Independent of statute a municipality by virtue of, and as incident to, the ordinary powers given it by the state, and as necessary to a proper exercise of its functions as a municipal corporation, has the right to use its accumulated funds and current revenues, not otherwise appropriated, for the use of furnishing its streets, alleys,

§ 1784. Same—power to own and operate street railways.⁴

§ 1785. Power to furnish water and light to individuals.⁵

§ 1786. Power to construct and operate competing plant.⁶

§ 1788. Power to acquire property outside territorial limits.⁷

parks, or other public places and buildings with electric lights. *Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393, 394, citing § 1783, vol. 4, ante.

⁴ *Churchill v. Grants Pass*, 70 Or. 283, 141 Pac. 164; *Waldy v. Seattle*, 93 Wash. 407, 161 Pac. 65; *State ex rel. v. Bridges*, 97 Wash. 553, 166 Pac. 780; *Jahr Contracting Co. v. Seattle*, 74 Wash. 298, 133 Pac. 458.

Amendment to city charter and contract made pursuant thereto authorizing construction of a railroad by city, held invalid, where the main purpose thereof was to aid a private enterprise. *Hunter v. Roseburg*, 80 Or. 588, 157 Pac. 1065.

City cannot aid private enterprise. Section 359A, ante.

⁵ Where city is authorized to operate an electric lighting plant to furnish light to city and its inhabitants, it has implied power to utilize the excess electric power for purpose of furnishing such power to operate machinery, providing such use does not interfere with main purpose of furnishing light. *McDonald v. Ward (Ala.)*, 77 So. 835.

⁶ *Humphrey v. Pratt*, 93 Kans. 413, 144 Pac. 197.

Electric light plant. *Andrews v.*

South Haven, 187 Mich. 294, 153 N. W. 827, Ann. Cas. 1918B, 100.

Competing in business with citizen. Ann. Cas. 1918B, 104, (annotation.)

Plans and estimate of costs on receipt of petition for the purchase of a public utility, held to be of original construction. *O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038.

A covenant by a city not to grant to any other person or corporation a privilege similar to that granted to the covenantee does not restrict the city itself from exercising similar powers. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. ed. 353, followed in *United Railroads of San Francisco v. San Francisco*, 249 U. S. 517, 39 Sup. Ct. 361, affirming 239 Fed. 937, which rules that the city itself may establish a municipal railway system notwithstanding it had granted a prior franchise and under which a railway system was operated in the city.

⁷ Where city has power to provide electric lighting and is also authorized to acquire property within and without the limits of the city for corporate purposes, it may construct line of poles and wires outside of its limits or con-

§ 1789. Power to acquire plant of existing company.⁸

§ 1795. Procedure to determine whether municipality shall own its own plant.⁹

§ 1796. Special assessments to pay for waterworks.¹⁰

nect with a source from which it may receive electrical current. *Mansfield v. Cofer*, 145 Ga. 549, 89 S. E. 410.

⁸*Kenton Water Co. v. Covington*, 156 Ky. 569, 161 S. W. 988.

By provision of state constitution in Ohio, cities may acquire a public utility by condemnation or otherwise. *Dravo-Doyle Co. v. Orrville*, 93 Ohio St. 236, 112 N. E. 508.

Power to acquire water and light plant by purchase. *Backus v. Virginia*, 123 Minn. 48, 142 N. W. 1042.

Power to light streets is power to acquire by purchase a lighting plant. *Keenan & Wade v. Trenton*, 130 Tenn. 71, 168 S. W. 1053.

Law requiring a municipality, before constructing a waterworks system, to acquire by condemnation or purchase an existing system in operation, etc., held mandatory. *Asbury v. Albemarle*, 162 N. C. 247, 78 S. E. 146, 148.

⁹*Public Service Commission v. Helena*, 52 Mont. 527, 159 Pac. 24.

Electors to determine by vote. *Churchill v. Grants Pass*, 70 Or. 283, 141 Pac. 164; *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331; *Matthews v. Ellensburg*, 73 Wash. 272, 131 Pac. 839 (waterworks); *Jahn Contracting Co. v. Seattle*, 74 Wash. 298, 133 Pac. 458 (street railway); *Humphrey v. Pratt City Comrs.*, 93 Kan. 413, 144 Pac. 197.

Vote of electors not required.

Swindell v. Belhaven, 173 N. C. 1, 91 S. E. 369.

Extension of waterworks authorized without favorable vote of electors. *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239.

Extension of electric light plant authorized without approval by electors. *Shorts v. Seattle*, 95 Wash. 538, 164 Pac. 241.

Charter provisions, regulating method of initiating proceeding to acquire public utilities, by petitions must be followed. *O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038.

Where a statute requires that the question of a bond issue for the purpose of obtaining funds for the construction or purchase of a water system be submitted to vote of electorate, it was held that the proposition for purchase or construction was not a double proposition. The single proposition submitted to the voters was the securing of a municipal water supply system and issuance of bonds therefor; the manner of securing same, by purchase or construction was properly left to the city council. *Albuquerque v. Water Supply Co.*, 24 N. M. 368, 174 Pac. 217.

Where action is unauthorized injunction will lie at the suit of a citizen and tax payer. *Cooper v. Middletown*, 56 Ind. App. 374, 380, 105 N. E. 394, citing § 1795, vol. 4, ante.

¹⁰*Matthews v. Ellensburg*, 73 Wash. 272, 131 Pac. 839; *Felmet*

§ 1799. Power of municipality to sell supply for private purposes.¹¹

§ 1800. Power of municipality to furnish supply outside territorial limits.

“Power in a municipality to furnish water to its inhabitants must be rested upon direct legislation. * * * Grant of power generally to provide a water supply for the inhabitants of a municipality does not carry with it the right to furnish water to inhabitants in other territories.”¹²

§ 1801. Rights, duties and liabilities of municipality as owner of plant.¹³

Municipal liability to ordinary patrons due to insufficient supply arising from negligence exists in all proper instances,¹⁴ but lack of supply for uncommon and peculiar

v. Canton (N. C. 1919), 97 S. E. 728, 730, citing § 1796, vol. 4, ante.

¹¹ Butler v. Karb, 96 Ohio 472, 117 N. E. 953, 955, quoting with approval part of § 1799, vol. 4, ante.

¹² Kearny v. Bayonne (N. J. Eq. 1919), 107 Atl. 169, 171.

¹³ Oklahoma City v. Hoke (Okl.), 182 Pac. 692, 695, citing § 1801, vol. 4, ante; Fretz v. Edmond (Okl.), 168 Pac. 800, 803, citing § 1801, vol. 4, ante.

“When a city is engaged in operating a municipal plant under an authority granted by the general law it acts in a proprietary or business capacity. In this behalf it stands on the same footing as a private individual or a business corporation similarly situated.” Milligan v. Miles City, 51 Mont. 374, 384, 153 Pac. 276, citing § 1801, vol. 4, ante.

Section 2680, post; § 2680, vol. 6, ante.

¹⁴ Action for damages for alleged negligent failure of a city to furnish a sufficient supply of water for domestic and sanitary purposes. The action was denied in the particular case. “The adoption of a plan for supplying a city, or a given section of it, with water involves the exercise of a delegated governmental power; and an error of judgment with respect to the efficiency and adequacy of such system is not in the first instance reviewable by courts. On the other hand, it is equally well settled that the city is liable, in a proper case, for the negligent acts and omissions of its officers in relation to the performance of such ministerial corporate duties as may be imposed upon it by law. This line of demarcation between the non-liability and liability of a municipal corporation for official negligence is well recognized by the authorities, including the decisions of this

uses, it has been held, does not create liability. In such case, it appears, discretion is allowed which is not subject to judicial review.¹⁵

§ 1803. Rates.

Where the municipality owns its plant, the rates for water, light or any other product, furnished by it must be fair, reasonable and just, uniform and non-discriminatory. The same rules enforced against public service corporations in these respects, as herein already stated, are applied with full force to the municipality.¹⁶

court. * * * The municipality in devising plans and systems for supplying the public with water, sewerage and the like, exercised legislative duties involving the use of judgment and discretion, and ought not to be held liable to civil action for defects, or want of efficiency of plan, at least during the formative or experimental stage of the enterprise; yet after the work has been completed and experience has demonstrated that the system is inadequate and inefficient to meet requirements, or to effect the objects for which it was intended, there can be no reason to exempt the municipality from damages suffered by an individual from its continued use. * * * In the instant case the city with commendable promptitude took the necessary steps to furnish the plaintiff and other citizens similarly situated with additional water facilities after experience had shown the insufficiency of the original sup-

ply; and there has been nothing in connection with the discharge of its duty in that regard to subject it to a suit for damages." *Stansburg v. Richmond*, 116 Va. 205, 81 S. E. 26.

¹⁵ For example, failure to supply manufacturers with suitable water for uncommon and peculiar uses. *Oaks Mfg. Co. v. New York*, 206 N. Y. 749, 100 N. E. 414, 42 L. R. A. (N. S.) 291, 206 N. Y. 221, 99 N. E. 540, 42 L. R. A. (N. S.) 286, affirming 125 N. Y. S. 1030, 141 App. 130.

¹⁶ Rates must be reasonable; courts may interfere. *Chicago v. Northwestern Mut. Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770; *Culver v. Jersey City*, 45 N. J. L. 256.

Section 1744, ante.

Rates unjustly discriminatory, fixed in violation of statute will be restrained by the court. *Butler v. Karb*, 96 Ohio 472, 117 N. E. 953.

CHAPTER 36.

MUNICIPAL TRADING.

§ 1807. Power to engage in business in general.

§ 1809. Buying and selling fuel.

§ 1812. Quarries.

§ 1807. Power to engage in business in general.¹

§ 1809. Buying and selling fuel.

In Maine municipalities are authorized by statute to maintain coal, wood and fuel yards for the purpose of

¹ Operation of a public restaurant by a park district which by statute is a municipal corporation with specific powers relating to acquiring and maintaining parks, is ultra vires, authority therefor not being conferred. *State v. Tacoma Metropolitan Park Dist.*, 100 Wash. 449, 171 Pac. 254.

A municipal corporation is not liable to criminal indictment for violation of a penal statute (employment of female for more than 8 hrs. per day) occurring in the operation by such corporation of an unauthorized business (public restaurant), but an agent or superintendent representing the municipal corporation may be punished therefor. *State v. Tacoma Metropolitan Park Dist.*, 100 Wash. 449, 171 Pac. 254.

A Maine case referring to certain Massachusetts decisions (Re Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 1809, 182 Mass. 605, 66 N. E. 25, 211 Mass. 624, 98 N. E. 611, 42 L. R. A. (N.

S.) 221) said that "the conclusions reached by the majority in the Massachusetts cases seems to be: (1) That it is beyond the power of a municipal corporation to engage in the sale of commodities which are and can be easily conducted by private business concerns in competition with one another, and which can be sufficiently regulated thereby. In this we most heartily concur. (2) That the sale of fuel falls within this class of commodities, and there is no necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprises. Here we differ. (3) That, in regard to a condition in which the supply of fuel would be so small and the difficulty of obtaining it so great that persons desiring to purchase it would be unable to supply themselves through private enterprise, it is conceivable that agencies of government might be able to obtain

selling fuel at cost to the inhabitants, and maintenance of such fuel yards is not unconstitutional since it is a public purpose. "If lighting of private residences and buildings is a public purpose and one which the municipality can legitimately carry on, the heating of the same buildings is equally public. It is even a greater necessity. Gas and electric lights are in the nature of luxuries, but heat is indispensable."²

fuel when citizens generally could not. Under such circumstances, we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use. Here again we concur. The principle, therefore, seems to be conceded that, if the difficulty of obtaining an adequate supply exists, the furnishing of such supply by municipalities would be a public use. And this is the construction placed upon the Massachusetts opinion by learned text-writers." *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318, 323, citing § 1807, vol. 4, ante.

² The term "at cost" it was declared, should be construed as meaning without financial profit. The main ground of attack was that the maintenance of a municipal fuel yard was not a public use, and as the power of taxation is confined to public purposes, the authority conferred by the act could not be constitutionally exercised. "The exact line of cleavage between what is, and what is not, a public use it is sometimes difficult to mark. Some purposes readily align themselves on one side of the line as being clearly public in their nature, while others as readi-

ly fall on the other side as being obviously private, and there is a debatable ground between the two. Thus the support of schools, the relief of paupers, and the maintenance of highways are clearly public uses for which taxation is permissible, and it has also been held that the maintenance of a public clock, the purchase of a fire engine, the erection of a market house, the building of a memorial hall, the aid of a railroad, all come within the scope of the same term. On the other hand, taxes cannot be imposed to aid a private enterprise, and a municipality cannot assist individuals or corporations to establish or carry on such business, either directly or indirectly, nor can it engage in such business itself. * * * If the direct object is private, the indirect benefits that may result to the public, even in a large measure, are unavailing to remedy the vital defect. * * * The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes, because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary.

§ 1812. Quarries.³

What was clearly a public use a century ago may, because of changed conditions, have ceased to be such today. * * * On the other hand, what could not be deemed a public use a century ago may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now. * * * Thus a class of public uses has grown up and been recognized within a comparatively recent time due both to the growing needs of the community and to modern inventions calculated to meet those needs, that furnish, in our judg-

ment, a logical precedent for the case at bar. These public uses or utilities embrace water, light and heat." Referring to a Massachusetts opinion, the court said that the principle, therefore, seems to be conceded that, if the difficulty of obtaining an adequate supply exists, the furnishing of such supply by municipalities would be a public use. And this is the construction placed upon the Massachusetts opinion by learned text writers. *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318, 323, Ann. Cas. 1916C, 734 (p. 742, annotation), citing § 1809, vol. 4, ante.

³ *Radford v. Clark*, 113 Va. 199, 73 S. E. 571.

CHAPTER 37.

PUBLIC IMPROVEMENTS.

- I. POWER TO MAKE.
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I. POWER TO MAKE.

§ 1816. Nature and purpose of public improvement.¹

Public improvements that may be provided for by the municipality generally include necessary and appropriate

¹ *Marshall v. Meridian*, 103 Miss. 206, 60 So. 135.

Fountain for water to slack thirst of animals using the streets, held a "city purpose." *Water Supply Co. v. Albuquerque*, 17 N. Mex. 326, 128 Pac. 77.

Library, held a municipal purpose. *Tampa v. Prince*, 63 Fla. 387, 58 So. 542.

Municipal railroad authorized, as a public utility. *Waldy v. Seattle*, 93 Wash. 407, 161 Pac. 65; *State ex rel. v. Bridges*, 97 Wash. 553, 166 Pac. 780.

Sea wall to protect a city from tides and floods, held a public improvement, authorizing an ad valorem tax to pay for same. *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

Razing building. On sale of a garbage plant the razing of the building was held not a public work or improvement. *Grant v. Milwaukee*, 156 Wis. 635, 146 N. W. 780.

Subway station. *Union Real Estate Co. v. New York*, 170 N. Y. S. 784.

municipal buildings,² as court houses and appurtenances,³ town,⁴ or city halls, jails, etc.;⁵ waterworks;⁶ lighting, power and heating plants;⁷ safe, suitable and convenient

Local improvements, as distinguished from general improvements, § 2027, post; § 2024, vol. 5, ante.

² "If the primary object of a building to be constructed is a municipal purpose the fact that it may be incidentally used for theatrical purposes may not have the effect of rendering the action in erecting it invalid." *Smith v. Raton*, 18 N. Mex. 613, 140 Pac. 109.

Opera house. *Egan v. San Francisco*, 165 Cal. 576, 133 Pac. 294.

³ Law authorizing erecting, held not mandatory. *Klinck v. Pounds*, 163 N. Y. S. 1008.

⁴ **Town hall.** Suitable for the use of the fire department, municipal offices and other municipal purposes. "Town hall" is in common and almost universal use throughout New Jersey to designate the chief municipal building of a town, e. g., the place in which it transacts the public business of a town. Held, under particular statute town had no authority to build a new town hall. *Syms v. West Hoboken*, 90 N. J. L. 130, 100 Atl. 191.

⁵ **City Hall**, cells in, to be used in connection with a police court, held incidental thereto. "It is impossible to lay down an exact definition of a city hall. It is sufficient to say that where the buildings and appurtenances provided for are upon the same site, and are so related to each other and to the main purpose of the erection as to form practically a part of the same

general plan they may each and all be included within that category." *Champion Iron Co. v. South Omaha*, 93 Neb. 56, 139 N. W. 848.

⁶ **Colorado.** *Colorado Springs v. Pikes' Peak Hydro-Electric Co.*, 57 Colo. 169, 140 Pac. 921.

Georgia. *Hall v. Calhoun*, 140 Ga. 611, 79 S. W. 533.

Minnesota. *Backus v. Virginia*, 123 Minn. 48, 142 N. W. 1042.

Michigan. *North Michigan Water Co. v. Escanaba*, 199 Mich. 286, 165 N. W. 847.

North Carolina. *Asbury v. Albe-marle*, 162 N. C. 247, 78 S. E. 146.

Virginia. *Norfolk v. Norfolk County Water Co.*, 113 Va. 303, 74 S. E. 226.

Washington. *Matthews v. Ellensburg*, 73 Wash. 272, 131 Pac. 839.

United States. *Wichita Water Co. v. Wichita*, 234 Fed. 415.

⁷ **Colorado.** *Colorado Springs v. Pikes' Peak Hydro-Electric Co.*, 57 Colo. 169, 140 Pac. 921.

Kansas. *Humphreys v. Pratt City Comrs.*, 93 Kan. 413, 144 Pac. 197.

Minnesota. *Backus v. Virginia*, 123 Minn. 48, 142 N. W. 1042.

Michigan. *Andrews v. South Haven*, 187 Mich. 294, 153 N. W. 827.

Nebraska. *Bell v. David City*, 94 Neb. 157, 142 N. W. 523.

Tennessee. *Keenan & Wade v. Trenton*, 130 Tenn. 71, 168 S. W. 1053.

Washington. *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331.

streets, boulevards, parkways, parks,⁸ bridges,⁹ culverts, drains, sewers,¹⁰ sewerage disposal plants;¹¹ wharves,¹² docks,¹³ and public harbors.¹⁴

§ 1817. Nature of power.

The power to provide necessary and desirable public improvements is frequently directory as distinguished from mandatory.¹⁵

The power is generally regarded as legislative, and can not be surrendered by the municipality.¹⁶

Wisconsin. *Neacy v. Milwaukee*, 151 Wis. 504, 139 N. W. 409.

Lighting, power and heating plants; power given to Ohio municipalities to establish and operate. *Butler v. Karb*, 96 Ohio 472, 117 N. E. 953.

Electric lighting system, electric light distributing system for public lighting, money to be raised therefor by taxation on bond issue. *Livermore v. Millville*, 85 N. J. L. 655, 90 Atl. 380.

⁸ Parks, parkways and boulevards. *Chaplin v. Kansas City*, 259 Mo. 479, 168 S. W. 763.

Separation of grade crossings of railroads, with street and public ways. *American Tobacco Co. v. St. Louis*, 247 Mo. 374, 157 S. W. 502.

⁹ Bridge as a public improvement. *Warsaw v. Malone*, 159 N. C. 573, 75 S. E. 1011.

¹⁰ Drains. *Ainsworth v. Arizona Asphalt Paving Co.*, 18 Ariz. 242, 158 Pac. 428.

Sewerage and drainage. *Warsaw v. Malone*, 159 N. C. 573, 75 S. E. 1011.

¹¹ Veatch v. Gibson, 29 Idaho 609, 160 Pac. 1112.

¹² Hafner Mfg. Co. v. St. Louis, 262 Mo. 621, 172 S. W. 28.

¹³ Wharves and docks, scheme of

improvement, etc. *Paine v. Port of Seattle*, 70 Wash. 294, 127 Pac. 580, 126 Pac. 628.

¹⁴ Public Harbor. "A trust to carry on a commercial enterprise, unaffected by a public use, would probably be void * * * because city could not be invested with power to administer it. But in this state it is now well settled that a city can be given power to carry on within its limits a public utility or to improve and control a public harbor within its limits for the promotion of navigation and commerce." A grant of harbor land by the state to a city upon condition that the city improve and use such land for a harbor, held good in an action by the city to compel mayor to sign bonds for harbor improvement. *Long Beach v. Lisenby*, 175 Cal. 575, 166 Pac. 333.

Harbor improvements authorized. *Boettger v. Two Rivers*, 157 Wis. 60, 147 N. W. 66.

¹⁵ Power is usually directory, not mandatory, as power to erect a courthouse building—"Authorized," held not the same as "required" or "directed." *Klinek v. Pounds*, 163 N. Y. S. 1008.

See § 1836, vol. 4, ante.

¹⁶ The necessity, location and character of a public improvement

However, in obtaining for the city and its inhabitants a water supply it has been said to involve merely the exercise of the proprietary or business powers of the municipality, and not governmental functions.¹⁷

The same rule has been applied also to street improvements. In such work, the city is sometimes viewed as an agent of the property owners whose property is required to pay for the improvements.¹⁸

is a legislative question. *Mortell v. Clark*, 272 Ill. 201, 111 N. E. 993, 997.

"In regulating the repair and improvement of streets the city is exercising a legislative function and in performing such work a governmental duty is exercised by the city. A city can not, without express authority from the legislature to do so, contract away its legislative powers." *State ex rel. v. Milwaukee El. Ry. & Light Co.*, 157 Wis. 121, 147 N. W. 232, 235.

¹⁷ A city in the exercise of its powers to acquire a system of water works, and operate the same acts in its proprietary character, as distinguished from its governmental capacity. *Public Service Commission v. Helena*, 52 Mont. 527, 159 Pac. 24.

The passage of an ordinance to obtain a water supply for the inhabitants and the city at rates specified, involves merely the exercise of the proprietary or business powers of the city, and not the exercise of governmental functions. *Wichita Water Co. v. Wichita*, 234 Fed. 415, 420; *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

The establishment of a water system in a city is not a govern-

mental function in which the state may have such an interest as would give it power to compel its maintenance in a city. *Kenton Water Co. v. Covington*, 156 Ky. 569, 161 S. W. 988.

¹⁸ Where the expense of the improvement was to be borne by the property benefited through local assessment "under well settled rules the city was acting only as the agent of the property owners so affected." *Mechanics Bank v. New York*, 135 N. Y. S. 978, 151 App. Div. 87.

In providing public improvements "the city acts in its proprietary capacity. Its council is the agent of the property owners. In *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834, 24 L. R. A. (N. S.) 1275, we said: "The power to grade streets, lay sewers or water pipes, and to lay out the cost thereof on abutting property is not a governmental or public function in the strict sense." The city in such case acts merely as an agent ex necessitate; for while the burden is on the individual to improve the street, the nature of the work is such that it must be done in some order and with some relation to the improvement of connecting thoroughfares, to the end that the scheme of development

§ 1818. Municipal power to make.¹⁹

In the absence of constitutional restrictions the power to provide public improvements, may be granted by the legislature, and the method of its exercise may be specified, and such method must be observed in good faith.²⁰

and improvement may be harmonious. Beyond the right to do this work against the will of the abutting owner, and in accordance with the plans of its adoption the right of the city has not been extended. To hold that the city could ignore the first principle of agency—that is, that an agent is bound to serve his master and promote his interest—would be to put a burden upon an involuntary principal that has so far been unknown to the law.” *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005, 1006, approving *James v. Seattle*, 49 Wash. 347, 95 Pac. 273.

“In the laying out of a highway the city council does not act as an agent of the city but as a board of public officers. The members of the council are bound by the statute in the exercising of that public duty. When in their honest judgment damages have been caused by the lay-out of a street, to make award of such damage.” *Mevins v. Springfield*, 227 Mass. 538, 116 N. E. 881.

¹⁹ **Express power by charter.** *Williams v. Vallejo* (Cal. App.), 171 Pac. 834; *Lewis v. Pilot Mountain*, 170 N. C. 109, 87 S. E. 56.

Legislative act gave express power. *Kilcullen v. Webster*, 260 Pa. 263, 103 Atl. 592.

Culvert over a private water canal, held authorized by virtue of powers as to streets, etc. *South*

Yuba Water Co. v. Auburn, 16 Cal. App. 775, 118 Pac. 101.

²⁰ May by prescribing note of the council create a paving district. *Fitzgerald v. Sattler*, 102 Neb. 665, 168 N. W. 599.

Granted by legislature to be paid for by general levy of taxation or by means of special assessments against property specially benefited, or by issue of municipal bonds. Method laid down to be observed, of course. *Byrns v. Moscow*, 21 Idaho 398, 121 Pac. 1034, 1036; *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004; *People ex rel. v. Rock Island*, 271 Ill. 412, 111 N. E. 291.

“There is a presumption in favor of proper, as distinguished from improper, official conduct. Taxpayers have the right to assume that such improvements will be made, and the cost thereof levied and collected in accordance with the law.” *Kuick v. Grand Rapids*, 200 Mich. 582, 588, 166 N. W. 979, 981.

The mandatory steps to be taken pointed out by the applicable law must be observed in substance. “The official must usually take in the order prescribed and in rather strict observance of the charter (or applicable law) exercising always good faith.” *Kuick v. Grand Rapids*, 200 Mich. 582, 166 N. W. 979, 981.

It has been said that a municipality has inherent power to construct and maintain sewers.²¹

"A sewerage system is a public necessity," and may be authorized from power to make all regulations necessary to secure the general health, etc.²²

It has also been said that one of the paramount obligations of a municipality is to furnish its citizens (as far as possible) with a sufficient supply of water, not only for the public health, but for the public safety as well, in order to afford the means of extinguishing fires and preventing conflagrations. "A municipal corporation when exerting its functions for the public good cannot be shorn of its powers by implication. If in particular circumstances, it is sought to restrict the exercise of its public powers the right to do so must be manifest in clear and unmistakable terms."²³

Power to make improvements involves the method of paying for them, by general taxation, or special taxation or local assessments, against the property specially benefited,²⁴ or by bond issue,²⁵ and frequently the exercise of the right of eminent domain is necessary.²⁶

§ 1819. Where power vested.

The delegation of power necessarily limits its exercise to the authority specified, thereby excluding all other au-

²¹ *Kilcullen v. Webster*, 260 Pa. 263, 103 Atl. 592; following *Fisher v. Harrisburg*, 2 Grant Gas. 291.

²² *Princeton v. Pool*, 171 Ky. 638, 188 S. W. 758, 760.

May extend sewer system and levy cost thereof against abutting property. *Harris v. Churchill*, 152 N. Y. S. 73.

Sewers at expense of abutting property. *Bayes v. Paintsville*, 166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027.

²³ *Norfolk v. Norfolk County Water Co.*, 113 Va. 303, 74 S. E. 226.

²⁴ *Waddell Inv. Co. v. Hall*, 255 Mo. 675, 164 S. W. 541; *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004; *Shultise v. Taloga*, 42 Okl. 65, 140 Pac. 1190; *Rockwell v. Junction City*, 92 Kan. 513, 141 Pac. 299; *Kuick v. Grand Rapids*, 200 Mich. 582, 166 N. W. 979; *People ex rel. v. Rock Island*, 271 Ill. 412, 111 N. E. 291.

²⁵ § 2269, post; § 2269, vol. 5, ante.

²⁶ Private property for sewage disposition can be taken only by condemnation. *Princeton v. Pool*, 174 Ky. 185, 191 S. W. 865.

thority, public or private. Thus delegated power relating to named public improvements to county authorities excludes municipal authorities from exercising such powers, e. g., exclusive jurisdiction over improvements of county roads although within the municipal area.²⁷

§ 1820. Same—legislative control.²⁸

§ 1821. Same—authorities to provide for improvements.²⁹

²⁷ Cooper v. Fox, 87 Or. 657, 171 Pac. 408.

²⁸ Legislature may limit power of city to levy assessments for public improvements. Kuehl v. Edmonds, 85 Wash. 307, 148 Pac. 19; Van Der Creek v. Spokane, 78 Wash. 94, 138 Pac. 560; Chehalis v. Cory, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768.

Legislature may apportion the cost of a public improvement between two municipalities. Rylands v. Clark, 278 Ill. 39, 42, 43, 115 N. E. 829, following Lussem v. Chicago Sanitary District, 192 Ill. 404.

Legislature may give power to make public improvements by general taxation or by special assessments, or issue bonds, of course, within constitutional limitations, to make contracts therefor, as to method of paying. Byrns v. Moscow, 21 Idaho 398, 121 Pac. 1034.

Grade crossing laws, providing for adjustment, for example, between a municipality, a public service corporation as a railroad were held constitutional. Society for Prevention, etc., v. New York, 166 N. Y. S. 17, 99 Misc. Rep. 552.

Power to lay out and regulate streets, including authority to reg-

ulate the use of a street crossing over railroad tracks, is a "municipal affair," under the California Constitution providing that city charters emanating by virtue thereof shall not be subject to control by general laws as to municipal affairs. Los Angeles v. Central Trust Co., 173 Cal. 323, 159 Pac. 1169.

See § 229F, ante.

Street improvements are "municipal affairs" and within the control of the municipality. Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 Pac. 296.

²⁹ In establishing a system of electric lights, waterworks and sewage, under particular grant of power, held the municipality could act without submitting matter to the electors. Swindell v. Belhaven, 173 N. C. 1, 91 S. E. 369.

Board of public works given exclusive control of grading, etc., of streets, but in the construction of streets, etc., such board is to act with the council. The board may fix the grade of a street and the council may ratify such action. Aside from legislative functions, power as to street improvements may be vested in an administrative board. Barringer Land Co. v.

§ 1822. Same—delegation of power forbidden.³⁰

§ 1823. Law applicable.

The law applicable to the proceedings contemplated, of course, is to be followed. The method of proceeding, and the manner of defraying the expenses of the proposed improvement, usually determine what law should be in-

Barber Asphalt Co., 149 Ky. 132, 147 S. W. 893.

³⁰ Burnham v. Abrahamson, 21 Cal. App. 248, 131 Pac. 338.

When there is no city engineer to estimate the cost of the works, such duty may be given to mayor. Gratz v. Kirkwood, 182 Mo. App. 581, 166 S. W. 319.

Council cannot delegate to a street committee the determination of what sidewalks should be reconstructed and to reconstruct them. "The proceedings are ad invitum and must be strictly pursued." Clark v. Martin, 182 Iowa 811, 166 N. W. 276.

Council cannot delegate to a committee power to make alterations in the grade, plan and dimensions of the work. Gratz v. Kirkwood, 182 Mo. App. 581, 166 S. W. 319.

The duty of prescribing the width of a purposed sidewalk is legislative, not ministerial, and therefore cannot be delegated to the city engineer or other officer. California v. Kiesling (Mo. App.), 180 S. W. 559.

Power vested in the council "to determine the character, kind and extent" of the improvement cannot be delegated to the city engineer. Lawrence v. Portland, 85 Or. 586, 167 Pac. 587.

Leaving to the city engineer the time for the beginning of the work,

held not a delegation of legislative power. Fellows v. Dorsey, 171 Mo. App. 289, 300, 157 S. W. 995.

The power to fix the grade of a sidewalk or other improvement is a legislative act, and cannot be delegated. Hardingsburg v. Mercer, 172 Ky. 661, 663, 189 S. W. 1117; People v. Meerts, 267 Ill. 210, 108 N. E. 57.

Delegating to council committee the establishment of street grade by ordinance is void. Staunton v. Bond, 281 Ill. 568, 118 N. E. 47.

Details as to improvement work may be delegated. East St. Louis v. Vogel, 276 Ill. 490, 114 N. E. 941.

Power to assess special benefits in the construction of a sea wall to protect a city from tides and floods, held could be conferred on commissioners by the aldermen and mayor, where there was no constitutional assessor provided for municipalities. Sick v. Bay St. Louis, 113 Miss. 175, 74 So. 272.

"Whether a particular footway is or is not out of repair or so worn as to require it to be relaid in part or in whole is a matter too vast in detail to be passed on in a city of the size of Baltimore by separate ordinances in each case. That is a ministerial function rather than a legislative one, and as such is proper to be committed to a municipal official, such as a

voked. Moreover, changes or repeals of laws touching the premises should not be overlooked.³¹

In making or authorizing improvements, the municipal corporation need not declare by ordinance or resolution the law under which the proceedings are had.³²

'city engineer or highway engineer, or an appropriate department.'" Johns Hopkins Club Bldg. Co. v. Baltimore, 130 Md. 282, 100 Atl. 298, citing § 1822, vol. 4, ante.

³¹ Coleman v. Spring Const. Co. (Cal. App. 1919), 182 Pac. 473; Osburn v. Stone, 170 Cal. 480, 150 Pac. 367; Williams v. Vallejo (Cal. App.), 171 Pac. 834; State v. Superior Court, 87 Wash. 582, 152 Pac. 11; McAndrew v. Dunmore Borough, 245 Pa. 101, 91 Atl. 237; Patterson v. Baltimore, 130 Md. 645, 101 Atl. 589; White v. North Yakima, 87 Wash. 191, 151 Pac. 645; Borroughs v. Keokuk, 181 Iowa 660, 165 N. W. 83; Richardson v. Seattle, 97 Wash. 371, 166 Pac. 639.

Repeal, question as to. Huntsville v. Eatherton (Mo. App.), 182 S. W. 767; Ransome-Crummey Co. v. Woodhams, 29 Cal. App. 356, 156 Pac. 62; Catts v. Smyrna (Del. Ch.), 91 Atl. 297.

Revision of statutes, and adoption of law by electors. Lindsey v. Nacogdoches (Tex. Civ. App.), 1126.

Change of law after the institution of the proceedings, abandonment, and institution of new action. Schultz v. Ritterbusch, 38 Okl. 478, 134 Pac. 961.

Laws for different classes of cities and villages. Gibson v. Troupe, 96 Neb. 770, 148 N. W. 944.

Charters often provide a com-

plete system for street improvements, and certain other kinds, when general statute do not apply. Union Paving Co. v. Schenectady Board of Contract, etc., 134 N. Y. S. 740, 74 Misc. Rep. 646.

Whether charter or state law applicable. Thoits v. Byxbee (Cal. App.), 167 Pac. 166.

Provisions of local charter prevail over general statute, as street improvements are "municipal affairs" within the California Constitution. Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 Pac. 296.

Particular statute held inapplicable to making temporary walks on ungraded and unimproved streets. An ordinance providing for such improvement is not one of a general or permanent nature. Gibson v. Troupe, 96 Neb. 770, 148 N. W. 944.

Sewerage disposal work. Veatch v. Gibson, 29 Idaho 609, 160 Pac. 1112.

Statute repealing part of municipal charter. Batchelor v. Hammon, 82 N. J. L. 295, 82 Atl. 525.

If the charter does not prescribe the procedure the general law of the state may be followed in this respect where not inconsistent with charter. Thomas v. Petaluma (Cal. App.), 165 Pac. 1021.

Failure of a municipality to provide a scheme, although empowered to do so by its charter,

§ 1824. Improvements beyond corporate limits.

Authority to make improvements beyond the corporate limits is often implied on the ground of necessity, as sewer outlets,³³ or, as it is said, it arises by implication.³⁴

Improvements relating to a municipal purpose, without the municipal area are generally sanctioned, as sewers and drains, parks and water supply.³⁵

will authorize it to proceed under general state law. *Park v. Pacific Fire Extinguisher Co.* (Cal. App.), 173 Pac. 615, following *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923.

In the condemnation of land for a local improvement to be paid for by general taxation the municipality cannot proceed under the Local Improvement Act in Illinois. *Morrison v. Chicago & N. W. Ry. Co.*, 257 Ill. 376, 100 N. E. 991.

³² *Ransome-Crummey Co. v. Cornelius* (Cal. App. 1919), 178 Pac. 731.

³³ Sewer outlets beyond corporate limits authorized. Section 1434, ante; *Kelly v. Miller*, 139 N. Y. 991, 78 Misc. Rep. 584; *Jennings Heights L. & I. Co. v. St. Louis*, 257 Mo. 291, 165 S. W. 741; *Jones v. Sewer Imp. Dist.*, 119 Ark. 166, 177 S. W. 888.

Ditch to carry off surface water may be partly within and partly without the municipal boundaries. *Re Woolley*, 75 Wash. 206, 134 Pac. 825, 827.

In laying sewer outside of the municipal limits, the city must acquire right from the highway commissioner and the owner of the fee in the land. *Park Ridge v. Wisner*, 253 Ill. 434, 97 N. E. 841.

Municipality may acquire right to lay and maintain a sewer in another municipality by ordinance.

Berwyn v. Berglund, 255 Ill. 498, 99 N. E. 705.

Sewer outlets may be established outside the corporate limits on the ground of necessity. So a road belonging to the city without its boundaries may be improved. *Ketchikan v. Zimmermann*, 4 Alaska 336.

³⁴ Cities and towns in this state have power to open, construct and keep in order and repair sewers, drains, and to enter upon and condemn private property for such purposes. * * * If the statute does not expressly confer such power, to be exercised without the city's limits, it is granted by implication, being indispensable necessary to carry into effect the express powers granted by the statute, to open, construct and keep in order sewers and drains." *McLaughlin v. Hope*, 107 Ark. 442, 155 S. W. 910.

³⁵ Park beyond the corporate limits is a corporate purpose and may be improved. *Quitman v. Jelks & McLeod*, 139 Ga. 238, 77 S. W. 76.

Water Supply. City with power to establish and maintain water works may obtain water supply outside the municipal area. *Hall v. Calhoun*, 140 Ga. 611, 79 S. E. 533. But cannot supply water to those beyond the corporate limits without grant of power to do so.

The general rule is that one municipality cannot levy a tax for an improvement to be made within the limits of another municipal corporation.³⁶

§ 1825. Improvements by property owners.³⁷

Under many laws authority may be given by the municipality to property owners to construct sidewalks, curbs and gutters in front of their own premises at their own expense. Before such work can proceed, a declaration of necessity by ordinance or resolution is frequently required.³⁸

This opportunity is often extended, and if not accepted the work is let out by contract in the manner required.³⁹

Property owners may not construct improvements in front of their property on account of long established usage merely where there is no ordinance authorizing them so to do. Usage which is not according to law, though universal, cannot be set up to control the law.⁴⁰

§ 1826. Same—compulsory regulations.

Laws empower the municipality on legal notice to com-

Gainsville v. Dunlap, 147 Ga. 344, 94 S. E. 247.

Improvement districts duly authorized may make improvements within or without a city or town. *Mullens v. Little Rock*, 131 Ark. 59, 198 S. W. 262; *Jones v. Sewer Imp. Dist.*, 119 Ark. 166, 177 S. W. 888.

Park district duly authorized may make a local improvement partly within a city and partly without, and even extending into different townships. *Van Nada v. Goedde*, 263 Ill. 105, 104 N. E. 1072.

³⁶ *Muschbaugh v. East Peoria*, 260 Ill. 27, 102 N. E. 1027, following *Loeffler v. Chicago*, 246 Ill. 43, 92 N. E. 586, 20 Ann. Cas. 335; *People v. La Salle County*, 111 Ill. 527.

³⁷ *Hotchkiss v. Binghamton*, 211 N. Y. 279, 105 N. E. 410, reversing 148 App. Div. 533, 132 N. Y. S. 933.

Property owner may pave at his own expense. *Sparks v. Jackson* (Miss. 1918), 79 So. 67.

³⁸ *Kaynor v. District Court*, 178 Iowa 1055, 158 N. W. 557.

³⁹ *Schulte v. Currey*, 173 Mo. App. 578, 158 S. W. 888.

Sidewalks constructed by lot owner on the natural instead of established grade may be compelled by the city to be lowered to the established grade., *Jones v. Gillis*, 75 Wash. 688, 135 Pac. 627, 137 Pac. 819.

⁴⁰ *Creekmore v. Justice & Company*, 152 Ky. 514, 153 S. W. 738.

pel abutting property owners to construct sidewalks, footways, crosswalks, gutters, etc., in front of their own property at their own expense, and keep the same in good order and repair.⁴¹

Under many laws if the property owners fail to make the specified improvement after due notice, within the

⁴¹ *Labadie v. Perry*, 170 Mich. 344, 136 N. W. 351; *Rice v. Pontiac*, 173 Mich. 41, 138 N. W. 252

Abutters may be ordered by ordinance to repair sidewalks, and in event of failure the city may do the work and charge the cost of the same against the abutters. *Cantonborough v. Williams*, 67 Pa. Super. Ct. 239.

Property owner to improve sidewalk and with such material as city directs, and on refusal after ten days notice, the city may cause work to be done at the expense of property owner. "In *McQuillin*, Municipal Ordinance, Section 318 (§ 1826, vol. 4, ante) it is said that under powers in the charter ordinances have been sustained compelling abutting property owners on streets to construct and maintain sidewalks when necessary to the service and convenience of the pedestrians. This has been adjudged a proper exercise of the police power." *Marion v. Pilot Mountain*, 170 N. C. 118, 87 S. E. 53.

City may compel by ordinance owners of abutting property on street to build, rebuild, maintain and repair sidewalks. City may not only compel the building of sidewalks but also may compel the rebuilding, maintenance and repairs of same. Failure of owner to build sidewalks as directed by city cannot be excused by a show-

ing of a proper sidewalk. *Malvern v. Cooper*, 108 Ark. 24, 156 S. W. 845.

The owner cannot refuse because the street has not been opened to its full width. *Carlisle Borough v. Long*, 47 Pa. Super. Ct. 628.

City names the material. *Marion v. Pilot Mountain*, 170 N. C. 118; 87 S. E. 53. See §§ 1838 and 1874, post.

Property owner usually has authority to name material, especially if the city has not specified the kind. *Carlisle Borough v. Long*, 47 Pa. Super. Ct. 628.

The right of the city to charge the abutting owner with the duty of constructing sidewalks is supported on the theory that his property will be correspondingly benefited. *Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057, 1060.

Service pipes and connections in paved street in which gas or water mains or sewers have been laid to be paid for by property fronting on such street when notice to owner has been given and such owner has refused for ten days thereafter to do the work it may be done by city authorities. It was held that the owner had the right to do the work within the time named and until the expiration of such time the city could not do the work and charge it to the property owner. *Abbott v. Milwaukee*, 205 Fed. 933, 936.

time named, following the prescribed legal steps on the part of the municipal authorities, the city may do the work or let it out by contract and impose the cost thereof on the abutting property, as a special tax or assessment.⁴²

The substantial provisions of the law must be observed otherwise the special tax bills or assessments against the property will be invalid.⁴³

Notice to the property owner is generally regarded as mandatory.⁴⁴

The establishment of a proper grade by the public authorities is usually a condition precedent to the exercise by the municipality of the compulsory requirement.⁴⁵

§ 1827. Power to make street improvements.

In the absence of constitutional restrictions, as consid-

⁴² *Anderson v. Ocala*, 67 Fla. 204, 64 So. 775; *Wentland v. Clark & Hennery Const. Co.* (Cal. App.), 173 Pac. 480, 483.

On failure of property owner to construct within the time named the city may do so and levy special tax to cover cost. *Shultise v. Taloga*, 42 Okl. 65, 140 Pac. 1190.

City may order the sidewalks, footways, crossways, drains and gutters to be curved and paved and kept in good order, free and clear by the owners or occupants thereof or by the real property next adjacent thereto. If owners fail city may do the same at the expense of the city and charge the costs thereof to the property benefited. *Gasaway v. Klein*, 77 W. Va. 461, 87 S. E. 853.

Laws requiring are construed strictly. *Western Town Lot Co. v. Salem* (S. D.), 172 N. W. 503.

⁴³ *People ex rel. v. Cherry*, 262 Ill. 110, 104 N. E. 209.

Ordinance may require owner of

lots abutting on the street to construct sidewalks within a named time after the passage of the ordinance. Such ordinance is not effective until published as required by law. *People ex rel. v. Cherry*, 256 Ill. 582, 100 N. E. 287.

On failure of abutter to construct a gutter when ordered, the city may make, and costs thereof become a lien on his property, but the lien does not arise until the property owner has failed and the gutter is constructed by the city and the costs thereof ascertained. *Hamlin v. McCormick*, 85 Conn. 647, 84 Atl. 106.

City must pass resolution directing construction. *Kaynor v. District Court*, 178 Iowa 1055, 158 N. W. 557.

⁴⁴ Failure to give notice voids the assessment. *Catts v. Smyrna* (Del. Ch.), 91 Atl. 297.

⁴⁵ Before anyone shall be compelled to build a sidewalk the city shall establish first a proper grade. Under such power the city cannot

ered elsewhere,⁴⁶ the power of the legislature over public streets so far as the public interest is concerned is absolute and it may change their control at its pleasure, giving jurisdiction over them to the city, to park commissioners or to such other authority as it may see fit.⁴⁷

It is usual, however, to commit to the municipal corporation complete dominion over the regulation and improvement of streets within its limits.⁴⁸

The improvement may proceed within the limits of the reasonable discretion of the appropriate local authorities exercised in good faith as the law applicable prescribes.⁴⁹

Generally the municipal corporation has ample power to lay out, open, establish, widen and alter in any other manner, pave, grade and otherwise improve, close and vacate streets, alleys and public ways within its area, providing for the expense thereof in any manner authorized by the controlling law.⁵⁰

require the abutting owner to fill in and raise the street at his own expense to the level of the paved street before he lays the sidewalks. *Vicksburg v. Robinson*, 113 Miss. 687, 74 So. 617.

See § 1843, post.

⁴⁶ Section 227 et seq., ante; § 227 et seq., vol 1, ante; § 1310 et seq., ante; § 1310 et seq., vol 3, ante.

⁴⁷ *Illinois Malleable Iron Co. v. Lincoln Park Comrs.*, 263 Ill. 446, 105 N. E. 336, 51 L. R. A. (N. S.) 1203.

⁴⁸ *California. Osburn v. Stone*, 170 Cal. 480, 150 Pac. 367; *Chase v. Kalher*, 28 Cal. App. 561, 153 Pac. 397.

Georgia. Waycross v. Tomberlin, 146 Ga. 504, 91 S. E. 560.

Kansas. Hogan Milling Co. v. Junction City, 98 Kan. 253, 157 Pac. 1174.

Kentucky. Eisenschmidt v. Ader (Ky. 1919), 215 S. W. 48.

Maryland. Baltimore v. Brengle, 116 Md. 342, 81 Atl. 677.

New York. Re Joiner St. Rochester, 164 N. Y. S. 272, 177 App. Div. 361.

Oklahoma. Alley v. Muskogee, 53 Okl. 230, 156 Pac. 315.

Texas. Bowers v. Machir (Tex. Civ. App.), 191 S. W. 758.

Washington. Buck v. Monroe, 85 Wash. 1, 147 Pac. 432; *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645.

⁴⁹ *Barber Asphalt Paving Co. v. Kansas City Hydraulic Press Brick Co.*, 170 Mo. App. 503, 156 S. W. 749.

Whether street or boulevard and whether procedure laid down had been observed. *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 168 S. W. 721.

⁵⁰ *Arkansas. McClendon v. State* ex rel., 129 Ark. 286, 195 S. W. 686.

Illinois. Laynaud v. Cherry, 203

In such work laws permit the establishment of special,⁵¹ or local improvement⁵² and lighting districts.⁵³

§ 1828. Same—cannot be relinquished.⁵⁴

§ 1829. Same—sidewalks.⁵⁵

Ill. App. 541; *People v. Rock Island*, 271 Ill. 412, 111 N. E. 291.

Louisiana. *Connell v. Yazoo & M. V. R. Co.*, 141 La. 701, 75 So. 652.

Minnesota. *Chicago, M. & St. P. Ry. v. LeRoy*, 124 Minn. 107, 144 N. W. 464.

Mississippi. *Byran v. Greenwood*, 112 Miss. 718, 73 So. 728.

Massachusetts. *Nevins v. Springfield*, 227 Mass. 538, 116 N. E. 881.

New Mexico. *Water Supply Co. v. Albuquerque*, 17 N. Mex. 326, 128 Pac. 77.

Pennsylvania. *United Brethren Congregation v. Emaus Borough*, 56 Pa. Super. Ct. 136.

South Carolina. *Stone v. Greenville (S. C.)*, 96 S. E. 520.

Utah. *Gray v. Salt Lake City*, 44 Utah 204, 138 Pac. 1177.

May vacate streets. *Canady v. Coeur D'Alene Lumber Co.*, 21 Idaho 77, 120 Pac. 830.

Tunnel beneath the surface of a street so as to connect property of department store on both sides of the street may be authorized. *People ex rel. v. Marshall Field & Co.*, 266 Ill. 609, 107 N. E. 864.

In improving streets or sidewalks the city may change the grade, widen the street, etc. *Rogers v. New London*, 89 Conn. 343, 94 Atl. 364.

Power to pave streets includes curbs, sidewalks, gutters, trimmings and grading. *Hoefler v.*

Milwaukee, 155 Wis. 83, 143 N. W. 1038.

Power to construct improvements is authority either to repair or to reconstruct paving, etc. *Ellyson v. Des Moines*, 179 Iowa 882, 162 N. W. 212.

City may construct subways for public safety and convenience. *Moffat v. Denver*, 57 Colo. 473, 143 Pac. 577.

Power to build bridges. *Hoke County v. Raeford (N. C. 1919)*, 100 S. E. 513.

⁵¹ *McEwen v. Coeur D'Alene*, 23 Idaho 746, 132 Pac. 308.

⁵² *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645.

⁵³ *Parker v. Wallace*, 142 N. Y. S. 523, 80 Misc. Rep. 425; § 2052, post; § 2052, vol. 5, ante.

⁵⁴ Power of city to compel a railway to put in, maintain and operate safety gates at crossing of its railway and a street which had been dedicated by the railway for street purposes wherein a contract between the city and railway was involved which granted to the city a right of way over the property of the railway in consideration of the city bearing the expense of the safety gates, etc. Held, not a bartering away the city's police power. *Florida East Coast Ry. Co. v. Miami (Fla.)*, 79 So. 682.

⁵⁵ *Illinois. Glencoe v. Uthe*, 253 Ill. 518, 97 N. E. 1057.

§ 1830. Same—power to improve is a continuing power.

Unless restricted by law the power to make local improvements at the expense of property benefited or otherwise as legally authorized, like the general power to tax, is a continuing power, and is not exhausted by being once exercised.⁵⁶

Kansas. *Dargatz v. Pauley*, 91 Kan. 698, 139 Pac. 419.

Kentucky. *Walton v. Dires*, 173 Ky. 323, 190 S. W. 1099; *Eisen-schmidt v. Ader* (Ky. 1919), 215 S. W. 48.

Louisiana. *Shreveport v. Riley*, 140 La. 565, 73 So. 681.

Missouri. *Kirksville v. Ferguson*, 262 Mo. 661, 172 S. W. 4; *Huntsville v. Eatherton* (Mo. App.), 182 S. W. 767.

Mississippi. *Vicksburg v. Robinson*, 113 Miss. 687, 74 So. 617.

Texas. *Jones v. Houston* (Tex. Civ. App.), 188 S. W. 688.

Utah. *Stott v. Salt Lake City*, 47 Utah 113, 151 Pac. 988.

Particular law referring to "any street or alley or part thereof," held not to include sidewalk improvements. *Abbott v. Milwaukee*, 148 Wis. 26, 134 N. W. 137.

Power to construct a tunnel includes the incidental power to establish and pave sidewalks to render it fit for public use. *Mardis v. McCarthy*, 162 Cal. 94, 121 Pac. 389, 392, distinguishing *Wilcoxon v. San Luis Obispo*, 101 Cal. 508, 35 Pac. 388.

City may order construction of, without giving property owner an opportunity to be heard. Law so providing is constitutional. *State v. Burns*, 124 Minn. 471, 145 N. W. 377.

Construction at cost of abutting property owners. *Holmes v. Heet-*

er & Son, 146 Ky. 52, 142 S. W. 210; *People ex rel. v. Moore*, 261 Ill. 549, 104 N. E. 179; *People ex rel. v. Cherry*, 262 Ill. 110, 104 N. E. 209.

Old sidewalks may be removed and new ones constructed in their place. *Mound City v. Melvin* (Mo. App.), 205 S. W. 254, 257.

Repaving of. *Wallace v. Atlanta*, 140 Ga. 649, 79 S. E. 554; *Olympia v. Turpin*, 70 Wash. 581, 127 Pac. 210; *Rettire v. North Yakima*, 75 Wash. 143, 134 Pac. 699.

Sidewalk need not be on the same grade as the cartway. *Brancher v. Somerset Borough*, 58 Pa. Super. Ct. 130.

Permanent sidewalks are not to be constructed until the "bed of the same shall have been graded so that when complete such sidewalk shall be at the established grade." *Kaynor v. Cedar Falls*, 156 Iowa 161, 135 N. W. 564.

Power "to cause sidewalks to be repaired, or to be taken up and relaid with new materials, or with new and parts of old materials," etc., only includes sidewalks out of repair. *Rickerton v. Milwaukee*, 155 Wis. 327, 144 N. W. 1101.

Power to pave a sidewalk includes power to repave when the sidewalk becomes worn or defective. *Wallace v. Atlanta*, 140 Ga. 649, 79 S. E. 554.

⁵⁶ *Wood v. Duke Land & Imp.*

§ 1831. Same—changing width and course of streets.⁵⁷

§ 1832. Same—paving, repaving and repairing distinguished.⁵⁸

§ 1833. Power to establish boulevards.⁵⁹

In opening a boulevard the steps taken must conform

Co., 165 N. C. 367, 81 S. E. 422; Knickerbocker Co. v. Seattle, 69 Wash. 365, 124 Pac. 922; Root v. Topeka (Kan. 1919), 180 Pac. 229.

"In the absence of anything to indicate an intention to the contrary there could be little doubt that the power thus conferred was intended to be a continuing one which could be exercised as often as necessity might require." Bettenbrock v. Miller, 185 Ind. 600, 112 N. E. 771.

"This power to grade further and improve the streets of the town is a continuing one, and may be exercised in the legal discretion of the municipal government, whenever the public may require it. * * * This discretion, although it may be a legal one, cannot be interfered with by the courts, except in case of manifest and gross abuse, or when it would be arbitrary and oppressive." Bennett v. Winston-Salem South-Bound Ry. Co., 170 N. C. 389, 87 S. E. 133.

⁵⁷ Chicago v. Lord, 277 Ill. 397, 115 N. E. 543.

Petition "to open, lay out, to widen, straighten, or otherwise change streets, alleys, and squares," held sufficiently broad to authorize the straightening of a street to avoid marked irregularities. Adair v. Spellman Seminary, 13 Ga. App. 617, 79 S. E. 589, 594.

⁵⁸ Sidewalks may be repaved when "dangerous, wornout and constructed of material other than that prescribed by the ordinances of Macon." Odom Realty Co. v. Macon, 144 Ga. 77, 86 S. E. 243.

Imposing cost as for "original construction" under Kentucky statute. Ludlow v. Ludlow, 252 Fed. 559.

Reconstruction and not repair. Cushing v. Fleming, 151 Mo. App. 471, 476, 477, 132 S. W. 52.

"Repair work"; "reconstruction." Bettenbrock v. Miller, 185 Ind. 600, 112 N. E. 771.

"Repair" and "reconstruct," as applied to sidewalks distinguished. Clark v. Martin, 182 Iowa 811, 166 N. W. 276.

The usual meaning of reconstruct is to rebuild or to construct anew, but its meaning may be so modified by statute as to be synonymous with repair. Noel v. Lees Summit, 166 Mo. App. 114, 120, 148 S. W. 194.

Whether an improvement is "reconstruction" or merely repairs depends upon the character and extent of the work, and not on what it is designated. In case of dispute it is a question of fact. Parker-Washington Co. v. Merriwether, 172 Mo. App. 344, 349, 158 S. W. 74.

⁵⁹ See § 1280, ante; § 1280, vol. 3, ante.

to legal requirements, and the things to be done, to perfect the boulevard must follow, otherwise the boulevard will not be established.⁶⁰

Boulevards as at present constructed are not circumscribed by straight lines, nor is there any inherent reason that their boundaries should be so confined. Accordingly a charter provision authorizing the establishment by ordinances of "a building line" to a boulevard was properly construed to mean at least two lines, one on either side, not, however, straight lines but limits or boundary lines, and that houses should be erected within the distances of these limits as prescribed.⁶¹

⁶⁰ *St. Louis v. Christian Bros. College*, 257 Mo. 541, 165 S. W. 1057; *Albers v. St. Louis*, 268 Mo. 349, 362, 188 S. W. 83.

⁶¹ "Is there anything in the word 'boulevard' that necessarily means straight building lines? Let us look into that. It was once a warlike term, and meant the flat top of a bulwark or rampart—the fortified wall roundabout a city. For all I know Belshazar, the son of grass-eating Nebuchadnezzar, drove his chariots on the walls of Babylon and hurled defiance at his foes. If he did he drove on a boulevard. As though beating a sword into a plowshare or a spear into a pruning hook, we are told by scholars that when in the course of time a city's obsolete walls are razed, the space occupied by the foundations was frequently turned into a street or avenue for the use and pleasure of citizens, and that the name boulevard was given to such street out of respect to and to connect it with its original use. Thereto all the lexicographers agree. Gradually its meaning was modified and enlarged until now it

means a street constructed with parklike features, a wide street, or a street encircling a town, one with sides or center for shade trees, flowers, seats, etc., and not used for heavy teaming. (*Howe v. Lowell*, 171 Mass. 575, 580-1, 51 N. E. 536.) A broad street, promenade or walk planted with rows of trees, a broad avenue in or around a city—one especially designed for pleasure walking or driving. (*West Chicago Park Comrs. v. Farber*, 171 Ill. 146, 160, 49 N. E. 427.) So the word 'boulevard' which originally indicated a bulwark or rampart, and was afterwards applied to a public walk or road on the site of a demolished fortification, is now employed in the same sense as public drive. (*People ex rel. v. Green*, 52 How. Pr. 440, 445.)

"It is manifest that the military walls, known as boulevards, were not confined by straight lines and there is no inherent reason why the pleasure drives on the site of such demolished fortifications should be confined by straight lines. As the idea of a boulevard is

In the establishment of lines to which structures on the boulevard shall conform obviously here, as in all municipal exercise of power, the principle of equality must be observed. If classification is adopted it must be based on reason, that is, the same rule for all within the scope of the regulations. Thus under a charter empowering the city "to establish a building line to which all buildings, fences and other structures thereon shall conform," an ordinance relieving specified abutting properties from building line restrictions and requiring all other property owners to conform thereto, with no reason given or attempted for such discrimination of properties, violates the rule of reasonable classification and hence is void.⁶²

borrowed, was not the character of its sides also borrowed from the original? May we not assume to know as a matter of common knowledge that many a boulevard is of irregular dimensions and sides, sometimes a drive with wide borders which, a little further on, swells into a wide street with irregular sides and parklike proportions and effects? We think so." *St. Louis v. Handlan*, 242 Mo. 88, 95, 96, 145 S. W. 421, per Lamm, J.

⁶² "The ordinances in question established a building line and in the same breath exempted certain properties from the established line. The owners of those exempted properties were authorized to build regardless of the line established and to that extent the ordinances fly in the face of both the language and intentment of the charter. No reason is given or attempted for such classification of properties and we know of none that could be given, where the ordinances (as here) do not require existing structures to be razed. No ordinance can make

fish of one and fowl of another in the same natural class and be valid. To loose one and bind another abutting property owner is not lawmaking in the sense of making one rule for all within the scope of the law. It ignores the primal lawmaking idea of equality and uniformity. It is a mere capricious, arbitrary and irregular exercise of the lawmaking power confided to the municipal assembly. The benefits of the ordinances are unequally distributed among the property owners from Grand to Kingshighway, and its burdens are unequally laid on the necks of the same property owners. Evil would be the fruit if the precedent were established for such transparent favoritism. If the named exemptions are to be allowed, then why not (as put by appellant's counsel) indefinitely extend them, exempt most of the property owners and thereby buy peace for the scheme? Or the powerful be loosed and the weak bound?

"We think the ordinances violate the charter provision quoted

Laws frequently provide a method of changing a boulevard into a street. As preliminary to the enactment of the ordinance directing the change, laws sometimes require the written consent of the owners, or a certain portion thereof (as two-thirds), of the land fronting on the boulevard. Such laws are held to apply only to boulevards which have an actual existence. Therefore, although a prior ordinance declared the street in question to be a boulevard, in manner and form as prescribed by the charter, but no steps were ever taken thereafter to render the street in fact a boulevard, as contemplated by the charter, as the street never in fact became a boulevard, it was held that the written consent of the property owners to the change is not a condition precedent; and, hence, without their consent the ordinance authorizing the establishment of the boulevard may be repealed, and the way will thus become a street again.⁶³

The use of the boulevard for traffic may be restricted.⁶⁴

§ 1833a. Construction of improvement laws.

The rule of strict construction applies to statutes regulating municipal improvements. The principle is so well settled that a citation of authorities to support it is not needed.⁶⁵

and are void." *St. Louis v. Handlan*, 242 Mo. 88, 96, 97, 145 S. W. 421, per Lamm, J.

⁶³ *St. Louis v. Christian Bros. College*, 257 Mo. 541, 165 S. W. 1057.

When a street becomes a boulevard under particular law, *Albers v. St. Louis*, 268 Mo. 349, 188 S. W. 83.

⁶⁴ Use of, by vehicles carrying goods may be regulated. Regulations as to use of for team traffic to wagons carrying merchandise, etc., to premises abutting thereon. *Illinois Malleable Iron Co. v. Lin-*

coln Park Comrs., 263 Ill. 446, 105 N. E. 336, 51 L. R. A. (N. S.) 1203.

⁶⁵ *McAndrew v. Dunmore Borough*, 250 Pa. 101, 91 Atl. 237.

Strict rule discussed. *Abbott v. Milwaukee*, 148 Wis. 26, 134 N. W. 137.

Law to be strictly construed, even where the statute recites it shall be liberally construed for the purpose of carrying out the object for which it is intended. *Buck v. Monroe*, 85 Wash. 1, 147 Pac. 432.

Radical departure from method

All applicable laws on the subject are to be construed together.⁶⁶

Numerous applications appear throughout this chapter and the one which follows on special taxation and local assessments.

II. MUNICIPAL DISCRETION.

§ 1834. General consideration.⁶⁷

The general rule is well settled that the exercise of discretionary powers by the proper municipal authorities within the prescribed legal limits, concerning which reasonable differences of opinion may exist, in good faith, without fraud, oppression or arbitrary action will not be reviewed by the courts.⁶⁸

Thus the necessity, character and extent of the imprescribed vitiates proceedings. *Osburn v. Stone*, 170 Cal. 480, 150 Pac. 367.

Method prescribed to be strictly pursued. *Lewis v. Chapman*, 147 Ga. 408, 94 S. E. 249.

Such proceedings "being in invitum must be strictly pursued in strict compliance with the law under which they are taken." *Barber Asphalt Paving Co. v. Costs*, 171 Cal. 138, 152 Pac. 296.

The proceedings are in invitum and the method laid down by the law for acquiring jurisdiction which includes the giving of notice, must be strictly pursued. *Miller v. Portland*, 62 Or. 26, 123 Pac. 64.

"Such proceedings are in invitum and the statutes are to be somewhat strictly followed. Especially is this true with reference to those preliminary steps which appear to have been intended as essential to the exercise of the power by the city council." *Shaver*

v. J. W. Turner Imp. Co., 155 Iowa 492, 136 N. W. 711.

⁶⁶ "So as to produce a harmonious system if possible; the presumption that a new law relating to such subject was enacted with reference to the former laws." *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645.

City charter and statutes to be construed together, where latter become part of charter. *Osburn v. Stone*, 170 Cal. 480, 150 Pac. 367.

⁶⁷ See § 2003, post: § 2003, vol. 4, ante.

⁶⁸ Georgia. *Wallace v. Atlanta*, 140 Ga. 649, 79 S. E. 554; *Odom Realty Co. v. Macon*, 144 Ga. 77, 86 S. E. 243.

Idaho. *Veatch v. Gibson*, 29 Idaho 609, 160 Pac. 1112.

Illinois. *Oak Park v. Swigart*, 262 Ill. 614, 104 N. E. 1033; *Belleville v. Pfingsten*, 225 Ill. 293, 80 N. E. 266; *Leonard v. Garland*, 190 Ill. App. 216.

provement are committed to the discretion of the proper municipal authorities and their judgment is conclusive unless the court is clearly satisfied that their action has been oppressive and without reasonable grounds.⁶⁹

Kansas. *Fairchild v. Holton*, 101 Kan. 330, 166 Pac. 503.

Kentucky. *Marz v. Newport*, 173 Ky. 147, 190 S. W. 670, quoting with approval from § 1834, vol. 4, ante.

Maryland. *Baltimore v. Williams*, 129 Md. 290, 99 Atl. 362, 364.

North Carolina. *Bennett v. Winston-Salem South-Bound Ry. Co.*, 170 N. C. 389, 87 S. E. 133.

Courts will not substitute their judgment for that of the municipal authorities. *Henderson v. Enterprise* (Ala. 1918), 80 So. 115, 117; *Cramton v. Montgomery*, 171 Ala. 478, 55 So. 122.

"The general rule is that where legislative or discretionary powers are conferred upon municipal corporations, the courts will not interfere unless in the exercise of such discretion there is fraud, manifest oppression or gross abuse." *Mortell v. Clark*, 272 Ill. 201, 111 N. E. 993, 997.

Referring to improvement boards it was said: "These boards have only the powers expressly granted, but they must act under many circumstances, and their actions must be adjusted to meet the exigencies of each particular case and the sound discretion of the members of the board exercised where this discretion is not controlled or denied by the legislature; and the discretion to be exercised is that of the officer who is familiar with the situation

and performs the duty imposed upon him and not that of the court which reviews his action." *Cherry v. Bowman*, 106 Ark. 39, 152 S. W. 133, 137.

Although ordinances may not contravene any statutory provisions and may be within the scope of municipal charter powers, yet the courts may hold the same void when shown to be unreasonable and oppressive, and that the improvements provided, therein and made are useless and without any substantial benefit to the property owner or the community of which they are a part. *Maret v. Hough* (Mo. App.), 185 S. W. 544, citing *Corrigan v. Gage*, 68 Mo. 541; *State ex rel. v. Birch*, 185 Mo. 205, 219, 85 S. W. 361; *Morse v. West Port*, 136 Mo. 276, 37 S. W. 932; *McGhee v. Walsh*, 249 Mo. 266, 155 S. W. 445. "But in these and many like cases the rule is stated to be that within the charter powers a large discretion must be given the city authorities as to the usefulness and propriety of making the improvements, and unless it appears that the ordinances providing the same are an abuse of this discretion amounting to arbitrary action on the part of the city and operating oppressively to the property owners and a fraud of their rights the validity of the ordinances will be upheld." *Maret v. Hough* (Mo. App.), 185 S. W. 544.

⁶⁹ *Chicago v. Hirschl*, 275 Ill. 60,

§ 1835. Discretionary power relating to public improvements illustrated.⁷⁰

Within the limits of the law applicable the proper municipal authorities, acting in good faith and solely for

113 N. E. 899; *Chicago v. Kehilath Aushe Mayriv*, 284 Ill. 210, 119 N. E. 905; *Marengo v. Eichler*, 245 Ill. 47, 91 N. E. 758; *Belle-ville v. Pfingensten*, 225 Ill. 293, 80 N. E. 266; *Bradley v. New York Central R. Co.*, 277 Ill. 608, 115 N. E. 640, 642, following *Marengo v. Eichler*, 245 Ill. 47, 91 N. E. 758; *Shaw v. Stoeltzing*, 180 Mo. App. 113, 167 S. W. 1158.

Declaration of necessity. Section 1871, post; §1871, vol. 4, ante.

If ground for reasonable difference of opinion concerning necessity of improvement, court will not interfere. *Chicago v. Kehilath Anshe Mayriv*, 284 Ill. 210, 119 N. E. 905.

In the extension of a street, the ordinance is competent evidence of necessity. *Ashley v. Minneapolis St. P. & S. S. M. Ry. Co.*, 37 N. D. 147, 163 N. W. 727.

Only set aside if action is without reasonable grounds and oppressive. *Bradley v. New York Cent. R. Co.*, 277 Ill. 608, 115 N. E. 640.

"It is, of course, not a valid objection that the improvement was not needed. Of this the town council was the sole judge, and the decision of that body is not reviewable by this court." *Catts v. Smyrna (Del. Ch.)*, 91 Atl. 297, 302.

Whether the location and character of the improvement are useful, advantageous or desirable for municipal purposes is a question

for determination by the city, subject only to review by a court where there is an abuse of power. *Chicago v. Chicago Sanitary Dist.*, 272 Ill. 37, 111 N. E. 491, 493.

"Since the power to determine the necessity for an improvement, the character of the same, and the material out of which it shall be constructed is wholly within the discretion of the city when not expressly controlled by statute, the courts are without power to set aside or annul assessments merely because they may not be in accord with the city officers as to the wisdom of the course pursued with reference to the manner in which a street is improved." *Knickerbocker v. Seattle*, 69 Wash. 365, 124 Pac. 922.

⁷⁰ *Colorado. Moffat v. Denver*, 57 Colo. 473, 143 Pac. 577.

Georgia. Odom Realty Co. v. Macon, 144 Ga. 96, 86 S. E. 243.

Illinois. Belleville v. Miller, 257 Ill. 244, 100 N. E. 946, citing *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217.

Louisiana. Shreveport v. Hester, 139 La. 495, 71 So. 779.

North Carolina. Wood v. Duke Land & Improvement Co., 165 N. C. 367, 81 S. E. 422.

Washington. White v. North Yakima, 87 Wash. 191, 51 Pac. 645.

Court cannot compel board to appropriate money for an improvement, for example a subway station, that does not meet its ap-

the public welfare, may determine without judicial interference when and what streets shall be opened and closed;⁷¹ when and what street shall be improved, the parts and the method thereof,⁷² cost of the improve-

proval. *Union Real Estate Co. v. New York*, 170 N. Y. S. 784, 786.

Manner of the exercise of discretionary power is open to judicial review. *Chicago v. Municipal Engineering & Const. Co.* (Ill. 1920), 127 N. E. 65.

⁷¹ *Re Block Bounded by Chauncey St.*, New York, 140 N. Y. S. 386, 155 App. Div. 482, 141 N. Y. S. 482, 141 N. Y. S. 1111, 156 App. Div. 907.

The city is the sole judge when a street shall be opened or closed for public travel, subject however to the constitutional inhibition against taking or damaging private property for public use. *Gorman v. Chicago, B. & Q. R. Co.*, 255 Mo. 483, 164 S. W. 509, 511.

In the absence of fraud determination by city to open street is conclusive as to necessity. "Nor can we say that a general scheme for public improvements which includes both the extension of streets and building of sewers therein is evidence of fraud in the passage of an ordinance as a part of such scheme, or that the scheme itself is unlawful." *St. Louis v. Semple* (Mo.), 199 S. W. 967.

Necessity for opening a street is within the discretion of the city authorities. In absence of fraud court will not review. *St. Louis v. Semple* (Mo.), 199 S. W. 967.

⁷² *Widening a street. Huntington v. Frederick Holding Co.* (W. Va. 1919), 101 S. E. 461; *Baltimore*

v. Williams, 129 Md. 290, 99 Atl. 362, 364.

Whether all or only a portion of a street as to width shall be improved. *Maysville v. Davis*, 166 Ky. 555, 179 S. W. 463.

Repaving. *Savannah v. Wade* (Ga. App.), 94 S. E. 1042; *Randall Bros. v. Atlanta* (Ga. App.), 95 S. E. 1016.

Parts of street to be repaved. *Walker v. Dobbins*, 152 Mo. App. 270, 275, 133 S. W. 387.

Discretion as to grading a street where all legal provisions are complied with substantially. *State ex rel. v. Goodrich*, 157 Mo. 40, 47, 165 S. W. 707.

Shaw v. Ludwig, 180 Mo. App. 113, 167 S. W. 1158, holding reasonable an ordinance providing for the grading of an outlying street which connecting with a county road would serve to complete a highway connecting the city with another.

Discretion in making changes in plan of improvement; presumption that action was in good faith. *Butler v. Kokomo*, 62 Ind. App. 519, 113 N. E. 391, 393, 394.

"So long as the court failed to find that the city had abused its powers, there could be no judicial interference even if the court itself had thought the paving unnecessary." *Fairchild v. Holton*, 101 Kan. 330, 166 Pac. 503, 505.

Question whether ordinance was unnecessary, unreasonable and oppressive because the street in-

ment;⁷³ the necessity for the construction of sewers and drains, and the time and manner thereof,⁷⁴ and whether

involved already had a fairly good pavement is within the discretion of the municipal authorities. "Courts cannot interfere with the action of a city council and declare an ordinance for local improvements void as unreasonable unless the evidence clearly shows that the ordinance is arbitrary, unjust and oppressive." *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946.

Kind and character of work, and nature of improvement. Courts will not interfere. *Chicago v. Max* (Ill. 1919), 124 N. E. 648.

What improvement is required, its nature and character, when it shall be made and the manner of its construction. "Such discretion when honestly exercised is not reviewable by the courts." *People ex rel. v. Omen* (Ill. 1919), 124 N. E. 860, 862, per Carter, J.

Whether should be one improvement or separate improvements. *People ex rel. v. Omen* (Ill. 1919), 124 N. E. 860.

"The question of the propriety of having streets, whether of the same or different levels, must necessarily be left to the judgment and discretion of the council and those interested where petitions are necessary." *Carlson v. South Omaha*, 91 Neb. 215, 135 N. W. 1047.

⁷³ Price of street improvement, if not grossly excessive so as to raise presumption of fraud is within discretion of proper municipal authorities. *Wagoner v. La Grande*, 89 Or. 192, 173 Pac. 305.

"We cannot say that any ordinance requiring two water mains in

a street is so unreasonable as to constitute an abuse of discretion by the council or an arbitrary imposition of an unjust burden upon the owners of property." *Chicago v. Hirschl*, 275 Ill. 60, 113 N. E. 899.

The limits of the district to be taxed rest in the discretion of the municipal authorities and the courts will interfere only to correct a clear abuse of that discretion. *People ex rel. v. Omen* (Ill. 1919), 124 N. E. 860, 862.

⁷⁴ *Thomas v. Grinnell*, 171 Iowa 571, 153 N. W. 91.

Repairs in paving and drainage are within municipal discretion. *Johns Hopkins Club Bldg. Co. v. Baltimore*, 130 Md. 282, 100 Atl. 298.

Necessity of a sewerage system is for the municipal authorities and their conclusion is conclusive, in absence of fraud or oppression. *Bradley v. New York Cent. R. Co.*, 277 Ill. 608, 115 N. E. 640.

"It is true that city councils are, generally speaking, the sole judges of the necessity of sewers and of the efficiency, durability and adaptability of those already in existence." *Robertson Lumber Co. v. Grand Forks*, 27 N. D. 556, 147 N. W. 249, 253.

A presumption exists in favor of the validity and reasonableness of an ordinance for the construction of a sewer which includes a cemetery within the sewer district and taxes the cemetery property for a part of the cost of construction. Burden to prove the contrary is upon the objector, to overcome the

drains are incidental to street paving work;⁷⁵ the improvement of wharves and docks;⁷⁶ the necessity of abolishing grade crossing of streets with railroad tracks;⁷⁷ the necessity of taking appropriate action as to transportation facilities;⁷⁸ the operation of public utilities, but without discrimination,⁷⁹ as to rates or service.⁸⁰

prima facie case by satisfactory evidence. *Mullins v. Mount Saint Mary's Cemetery Association*, 268 Mo. 691, 698, 187 S. W. 1169.

Reasonableness of the exercise of power to require the establishment of sewers and drains, expressly made subject to review. *Welch v. Cogan*, 126 Md. 1, 94 Atl. 384, 389.

"It scarcely need be said that the reasonableness of the exercise of any such power as that entrusted to the state board of health by the act of 1914 is always open to question." *Ibid*, citing *State v. Gurry*, 121 Md. 541, 88 Atl. 546, 47 L. R. A. (N. S.) 1087.

Incidentals to a complete sewerage system as outlets, disposal works, etc., is within the discretion of the proper municipal authorities. *Veatch v. Gibson*, 29 Idaho 609, 160 Pac. 1112, 1115.

If no fraud, etc., courts will not interfere with the establishment of sewer districts. *Washington v. Stumpe* (Mo. App.), 197 S. W. 165.

⁷⁵ Decisions of municipal authorities that certain drains were necessary, as incidental to work of paving streets, held conclusive. *Ainsworth v. Arizona Asphalt Paving Co.*, 18 Ariz. 242, 158 Pac. 428, 431.

⁷⁶ Discretionary with city as to whether wharf shall be improved, and when and parts thereof. *Haf-*

ner Mfg. Co. v. St. Louis, 262 Mo. 621, 172 S. W. 28.

Improvements for public docks, wharves for commercial purposes. *Riverdale Realty Co. v. New York*, 153 N. Y. S. 742, 168 App. Div. 103.

⁷⁷ Necessity for depression of railroad tracks to abolish grade crossing with street is an exclusive question for the municipal authorities. *American Tobacco Co. v. St. Louis*, 247 Mo. 374, 433, 157 S. W. 502.

⁷⁸ "The necessity for action by the city authorities concerning transportation facilities is to be solved by the exercise of the judgment of the municipal authorities, proceeding within the limits of their general authority," holding that the construction of a municipal railroad along a street upon which there was operated a private railroad was a legislative and not a judicial question, in the absence of evidence of the exercise of arbitrary power. *United Railroads v. San Francisco*, 239 Fed. 987, 996.

⁷⁹ The management and operation of a lighting and heating plant is within the discretion of the municipal authorities. However, where the rates are unjustly discriminatory the court may interfere. *Butler v. Carb*, 96 Ohio 472, 117 N. E. 953.

⁸⁰ Section 1697 et seq., ante.

§ 1837. Discretion as to plans in general.⁸¹

Courts approach the consideration of legislative plans for public work by endeavoring to approximate just and practical results.⁸²

§ 1838. Discretion in selecting materials.⁸³

III. EXERCISE OF POWER.

a. General consideration including preliminary proceedings.

§ 1842. Streets to be established.⁸⁴

Laws often distinguish between opening a street and

⁸¹ "The power to order the improvement carries with it as a necessary incident the additional power, not only to prescribe the length, width and material of the proposed sidewalk, but all other specifications including the grade thereof." *Hardingsburg v. Mercer*, 172 Ky. 661, 663, 189 S. W. 1117.

⁸² "It is not the duty of courts to approach legislative plans for public works, promoting public welfare, with a cold and hostile countenance as if determined to drive a coach-and-six through them or make them perish by overnice analysis in criticism. On one side, to be reckoned with, stands the axiom of Jeremy Bentham to wit: 'The greatest happiness of the greatest number is the foundation of morals and legislation.' On the other stands the legal maxim in a dead language, to wit: *Inde datae leges ne fortior omnia posset*, which (a scholar assures me) means: Laws are made lest the stronger party should possess all, i. e. for the protection of the weak, the individual. Peradventure it is by recognizing both great and small,

public right and private right, and holding the scales even between the two that courts by approximation get at just and practical results in suits between the public and individuals. In performing that high and delicate function, courts should sound at every step to see if the ground is solid and they are not usurping the province of the law-maker in making a judicial out of a legislative question." *Kansas City v. Woerishoeffer*, 249 Mo. 1, 20, 21, 155 S. W. 779, per Lamm, C. J.

⁸³ *Meek v. Chillicothe*, 181 Mo. App. 218, 167 S. W. 1139.

Power to order the improvement carries with it as a necessary incident the further power to select the material. *Hardingsburg v. Mercer*, 172 Ky. 661, 663, 189 S. W. 1117.

New sidewalk may be constructed of different material from the old, within the discretion of the proper authorities. *Abbot v. Milwaukee*, 148 Wis. 22, 134 N. W. 136.

⁸⁴ *Melvin v. Central Const. Co.* (Ky. 1919), 215 S. W. 811.

grading, paving and curbing a street.⁸⁵ Judicial decisions often discuss this distinction. It cannot be ignored.

In establishing a street it is first opened or laid out. If the land for this purpose is not purchased, dedicated or otherwise acquired, it is condemned, and afterwards the street is improved for use by grading, paving and curbing. An ordinance merely for opening a street cannot be construed to include the grading, paving or curbing. Opening means to lay out, fixing the location and outlines, and not to improve.⁸⁶

A street may be and often is opened and condemned for many years before any steps are taken to improve or pave it.⁸⁷

Different laws and ordinances provide for the steps required in opening and laying out a street, and the steps required for improving a street by grading, paving and curbing.⁸⁸

§ 1843. Establishment of street grade.

The municipality has power to establish,⁸⁹ and change grades of streets⁹⁰ at such times as within its discretion

⁸⁵ Reed v. Toledo, 18 Ohio 161; Bauman v. Ross, 167 U. S. 548, 586, 17 Sup. Ct. 966, 42 L. ed. 270; Hutt v. Chicago, 132 Ill. 352, 23 N. E. 1010; Baltimore v. Smith, 80 Md. 458, 31 Atl. 423; Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686.

⁸⁶ Patterson v. Baltimore, 130 Md. 645, 101 Atl. 589, 592; Douglass v. Riffin, 123 Md. 18, 22, 90 Atl. 1000, 1002; Oberheim v. Reside, 116 Md. 273, 81 Atl. 590.

⁸⁷ Dashiell v. Baltimore, 45 Md. 615, 626.

⁸⁸ "Lay out," "open," "close" and "widen," as applied to streets and public ways are not phrases of the same general nature. They are descriptive of widely dif-

ferent things which the city is authorized to do with respect to its streets. To "open" and "close" streets are the opposite of each other, and to "widen" a street is different from either. Stone v. Greenville (S. C.), 96 S. E. 520.

⁸⁹ Chase v. Kalher, 28 Cal. App. 561, 153 Pac. 397; Gray v. Salt Lake City, 44 Utah 204, 138 Pac. 1177; Moffat v. Denver, 57 Colo. 473, 143 Pac. 577.

A street grade may be established by user. Laynaud v. Cherry, 203 Ill. App. 541.

⁹⁰ Section 1844, post; § 1844, vol. 4, ante; Rettire v. North Yakima, 75 Wash. 143, 134 Pac. 699.

may seem necessary or desirable for the public needs or convenience,⁹¹ unless limitations exist in the law applicable.⁹²

Under many laws before improvements may proceed the street grade must be fixed.⁹³

The particular law usually prescribes the method of establishing the grade, whether by ordinance, resolution or in some other manner⁹⁴ which mode, of course, should

⁹¹ May establish or change for public welfare and not to subserve private interests. *Butler v. Kokomo* (Ind. App.), 113 N. E. 391, 393.

⁹² Grade of sidewalk. *Kirksville v. Ferguson*, 262 Mo. 661, 172 S. W. 4; *Staunton v. Bond*, 281 Ill. 568, 118 N. E. 47.

⁹³ *Hardingsburg v. Mercer*, 172 Ky. 661, 663, 664, 189 S. W. 1117.

Sidewalk may be laid on natural surface, and therefore failure to fix the grade for a temporary sidewalk does not render void the proceedings. *Monroe v. Pearson*, 176 Iowa 283, 157 N. W. 849.

“When a public street or highway is to be opened and land is to be condemned for the bed of the street or highway, it is but fair and equitable that the grade of such street or highway should first be established, in order that those who are to determine the benefits, if any, that the opening of such street or highway will be to the abutting lands may estimate the necessary costs of placing such abutting lands in a condition to receive the advantages of the street or highway as opened and graded; and the grade so established should be the one, so far as it can then be determined after a proper consideration of

the rights and interests of the adjacent land owners, that for all times will best subserve the public interest and convenience. Not to establish a grade at the time when the street is open, but at such time to assess the benefits without regard to costs and expenses to which the adjacent landowners may be subjected in cutting or filing their lands so as to enable them to receive the advantages of the road so opened, would, we think, be unfair and inequitable to them. The grade of the street is so materially involved in ascertaining the amount of benefits to be assessed against the abutting lands that it is right and proper, in our opinion, that a permanent grade, and not a tentative one, such as is here referred to by the city engineer, should be established before the city should be permitted to assess benefits of abutting lands, caused by the opening of such street or highway.” *Baltimore v. Johnson*, 123 Md. 320, 91 Atl. 156, 157; *Patterson v. Baltimore*, 124 Md. 153, 91 Atl. 966.

⁹⁴ *Smith v. Courtland*, 103 Kan. 142, 172 Pac. 1027.

Municipal board authorized to fix grade subject to council ratification. *Barringer Land Company*

be followed.⁹⁵ Failure to observe the specified mode may invalidate any change attempted.

This power can not be delegated,⁹⁶ as it is in nature legislative.⁹⁷

An ordinance establishing a grade for the center of the street, it has been held, operates to establish a grade for that portion of the street occupied by the sidewalk.⁹⁸

§ 1844. Same—change of grade.⁹⁹

§ 1847. Discontinuance of proceedings and abandonment of improvement.¹

If municipal authorities have power under the law to discontinue any improvement proceeding the courts will

v. Barber Asphalt Paving Co., 149 Ky. 132, 147 S. W. 893.

⁹⁵ Municipal authorities must act within their jurisdiction and comply substantially with the law. Collins v. Barre (Vt.), 101 Atl. 43.

Sidewalk ordinance must fix the grade. People v. Meerts, 267 Ill. 210, 108 N. E. 57.

⁹⁶ "The establishment of the grade for sidewalks or other street improvements is a legislative act involving the exercise of discretion, and cannot be delegated to the city engineer or to any other person." Failure to fix the grade is fatal in an action to enforce the statutory lien for the cost of the improvement. Hardingsburg v. Mercer, 172 Ky. 661, 663, 664, 189 S. W. 1117.

⁹⁷ Staunton v. Bond, 281 Ill. 568, 118 N. E. 47.

⁹⁸ Bierness v. Missouri Valley, 162 Iowa 720, 144 N. W. 628, 630; Gallaher v. Jefferson, 125 Iowa 324, 101 N. E. 124.

⁹⁹ In improving the grade of a

street or alley may be changed. Butler v. Kokomo (Ind. App.), 113 N. E. 391, 393.

Change of grade to be by ordinance. Johnson v. Granville, 36 N. D. 91, 161 N. W. 721; Landis v. Marion, 176 Iowa 240, 157 N. W. 841.

Applicability of constitutional provision as to compensation in change of grade. McGrew v. Granite Bituminous Paving Co., 247 Mo. 549, 155 S. W. 411.

After street grade has been established it may be changed only under some laws on petition of the owners of a major part of the property abutting thereon. Scott v. McClung, 137 N. Y. S. 661, 78 Misc. Rep. 2.

Petition of property for change of grade not required. Burnham v. Milwaukee, 155 Wis. 90, 143 N. W. 1067.

¹ St. Louis v. Bell Place Realty Co., 259 Mo. 126, 142, 168 S. W. 721.

Abandonment authorized. Gray v. Joliet (Ill. 1919), 122 N. E. 550.

not interfere unless in its exercise some constitutional rights are invaded.²

§ 1848. Preliminary proceedings.³

Prior to the formal initiation of the improvement proceedings whatever preliminary steps are prescribed, as a petition of a designated number of property owners,⁴ a named vote of a municipal board, or the legislative body, the adoption of a preliminary ordinance or resolution proposing or declaring the necessity for the improve-

Continuation of former proceedings. *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543; *Re Corona Ave. New York City*, 154 N. Y. S. 277; *Warner v. Ashland*, 154 Wis. 54, 142 N. W. 513.

Continuation of prior proceedings under change in law. *Ben-shoof v. Iowa Falls*, 175 Iowa 30, 156 N. W. 898; *Shultz v. Retterbusch*, 38 Okl. 478, 134 Pac. 961.

Dismissal as to part. *Fifteenth St. Investment Co. v. Denver*, 59 Colo. 189, 147 Pac. 677.

Improvement ordinance may be repealed and proceedings discontinued. *Stemmler v. Madison Borough*, 82 N. J. L. 596, 83 Atl. 85.

Certain council proceedings, held not abandonment of proposed improvements. *Farmer v. Dahl (Ariz.)*, 171 Pac. 130.

Procedure to discontinue under great New York Charter. *Re Crescent St., New York City*, 217 N. Y. 294, 111 N. E. 1069, affirming 155 N. Y. S. 1100, 170 App. Div. 946.

Until the assessment has been made and adopted the obligation of the city does not become fixed and the proceedings may be discontinued even in a case where the voters of the municipality

voted money for the improvement. *Appeal of Dellaripa*, 88 Conn. 565, 92 Atl. 116, citing *Kelley v. Waterbury*, 83 Conn. 270, 76 Atl. 467.

² *Re Nagy St. New York City*, 164 N. Y. S. 537, 543, 99 Misc. Rep. 314.

³ *Shapard v. Missoula*, 49 Mont. 269, 279, 141 Pac. 544, 547, citing 1848, vol. 4. ante.

Extension of sewer system with or without a petition. *Harris v. Churchill*, 152 N. Y. S. 73.

Municipal authorities may initiate paving street improvement, or it may be instituted by petition or property owners. *Fairchild v. Holton*, 101 Kan. 330, 166 Pac. 503.

May be instituted on petition of majority of abutting owners or on vote of a specified number of the members of the board at a regular meeting. *Walton v. Dires*, 173 Ky. 323, 190 S. W. 1099.

City can not condemn land for park purposes in a particular park district and assess benefits or benefits caused by its establishment when no such district in fact exists. *Pash v. St. Joseph*, 257 Mo. 332, 165 S. W. 710.

⁴ *Jones v. Houston (Tex. Civ. App.)*, 188 S. W. 688. Section 1856, post; § 1856, vol. 4, ante.

ment,⁵ estimate of the cost,⁶ determination of the mode of payment,⁷ notice to property owners interested,⁸ public

⁵ Sections 1870, 1871, post; §§ 1870, 1871, vol. 4, ante.

After adopting a resolution of necessity, jurisdiction to proceed obtained. *Bickel v. Warner-Quinlan Asphalt Paving Co. (Okl.)*, 174 Pac. 537.

Resolution of necessity, notification to property owners and failure to protest within named time authorizes city to proceed. *Price v. McPherson*, 92 Kan. 82, 139 Pac. 1162.

First, an act of ordinance or resolution declaring the intention to improve, stating the street or alley to be improved and the general character of the improvement. *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381.

"The rule is well established that the adoption of a resolution of necessity and the publication of a notice of intention to improve are conditions precedent to ordering or making the improvement, and that the statutes requiring same are to be somewhat strictly construed. As these are essential to the exercise of the power of the city council they are jurisdictional, without which all subsequent proceedings are invalid." *Davenport Locomotive Works v. Davenport (Iowa)*, 160 N. W. 106.

Initial resolution failed to describe the improvement, held fatal. *Garner v. Anniston*, 2 Ala. App. 389, 393, 56 So. 874.

⁶ Section 1866, post; § 1866, vol. 4, ante.

Public hearing and estimate of

cost of work are conditions precedent to enactment of ordinance, etc. *Chicago v. Huleatt*, 276 Ill. 466, 114 N. E. 1021.

Provision requiring a resolution containing an estimate of costs and provision concerning the lapse of time between the adoption of the resolution and the public hearing are mandatory and jurisdictional. *Chicago Heights v. Angus*, 267 Ill. 628, 108 N. E. 758.

Estimate of costs to complete street grading, held not required where work is slight. *Hilger v. Nebraska City*, 97 Neb. 268, 149 N. W. 807.

Estimate of costs is essential as it is a necessary part of the record. *Marion v. Sisney*, 252 Ill. 421, 96 N. E. 860.

⁷ Section 1863, post; § 1863, vol. 4, ante.

⁸ Section 1849, post; § 1849, vol. 4, ante; *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

Resolution or ordinance ordering, notice of, to property owners, etc. *Langstaff v. Durant*, 111 Miss. 779, 72 So. 198.

"The preliminary notice and all those other steps preliminary to the notice of the assessment and the assessment itself * * * are provisions of legislative grace. Being written in the statute they must be observed or the property owner may at the final hearing have the benefit of the omission of such of them as may be considered essential where there has been no waiver." *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173, 177.

hearing,⁹ and other requirements (if any) are to observed strictly, at least in substance,¹⁰ since certain of these preliminary steps are regarded as mandatory and jurisdictional,¹¹ and if disregarded the entire contemplated improvement proceedings may be rendered void. "All preliminary steps required to be taken before the passage of an ordinance for * * * an improvement should be strictly enforced and followed. * * * All the preliminary requirements necessary to be taken before the passage of an improvement ordinance are jurisdictional."¹²

§ 1849. Notice of proposed improvement.¹³

If the expense of the improvement is to be defrayed by special taxation or local assessment, while the property

⁹ Section 1859, post; § 1859, vol. 4, ante.

¹⁰ *Stadler v. Helena*, 46 Mont. 128, 127 Pac. 454; *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809.

¹¹ "Such proceedings are in invitum and the statutes are to be somewhat strictly followed. Especially is this true with reference to those preliminary steps which appear to have been intended as essential to the exercise of the power by the city council." *Shaver v. J. W. Turner Imp. Co.*, 155 Iowa 492, 136 N. W. 711.

"The preliminary proceedings required by the Local Improvement Act are essential to the passage of a valid improvement ordinance. The estimate of the cost and all the preliminary requirements necessary to be taken before the passage of an improvement ordinance are jurisdictional." *Chicago Heights v. Angus*, 167 Ill. 628, 108 N. E. 758, following *Chicago v. Nodeck*, 202

Ill. 257, 67 N. E. 39, and *Bass v. Chicago*, 195 Ill. 109, 62 N. E. 913.

¹² *Lovington v. Gregory* (Ill. 1919), 122 N. E. 504, 506.

¹³ *Lewis v. Chapman*, 147 Ga. 408, 94 S. E. 249.

Notice to property owners to be affected required. *Johnson v. Hardin* (Mont. 1919), 179 Pac. 824, 825, citing § 1849, vol. 4, ante.

All notice cannot be dispensed with, but the legislature may prescribe the kind of notice and the mode of giving it. *Harris v. Churchill*, 152 N. Y. S. 73, 78.

Publication of notice of intention required. *Davenport Locomotive Works v. Davenport* (Iowa), 169 N. W. 106.

Requirement as to notice not applicable to all improvements, as opening of highway. *Safe Deposit & Trust Co. v. Baltimore*, 121 Md. 522, 88 Atl. 267. Or repaving a sidewalk. *Wallace v. Atlanta*, 140 Ga. 649, 79 S. E. 554.

In adopting plans or maps or

owner must have notice at some time before the final assessment is made, in order to give the tribunal vested with jurisdiction of the subject-matter jurisdiction over his person and property, and so meet the constitutional requirement of due process of law, it is not required under some laws that he shall be notified of the intention to make the improvement, nor of the preliminary resolution. Neither is he entitled to notice of every intermediate step in the proceeding leading to an assessment against his property. It is sufficient if notice is given him before the assessment becomes final and conclusive.¹⁴

When notice is required by the applicable law at any stage of the proceedings it is usually viewed as jurisdictional,¹⁵ and therefore, essential to their validity¹⁶ espe-

specifications and prescribing the limits of the area to be drained by a sewer under some laws no notice thereof to the taxpayers is necessary. *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

Notice of resolution of necessity required. "The purpose of a notice of a resolution of necessity is to direct the attention of the property owners interested to the pendency of the project to pave a street for the improvement of which their property may be made liable and point them to the time when and place where their objections, if any, will be heard." *Spalti v. Oakland*, 179 Iowa 59, 161 N. W. 17.

"It is a cardinal principle that notice and an opportunity to be heard is essentially necessary in a proceeding whereby one may be deprived of his property, or a burden of taxation be laid thereon." *Miller v. Portland*, 62 Or. 26, 123 Pac. 64.

Notice as to condemnation of land for park to property owners,

object to permit them an opportunity to be heard, etc. *Pash v. St. Joseph*, 257 Mo. 332, 165 S. W. 710.

¹⁴ *Milliken v. Crail*, 177 Ind. 426, 98 N. E. 291, 293.

¹⁵ *Ferri v. Long Beach*, 176 Cal. 645, 169 Pac. 385; *Manley v. Marshfield*, 88 Or. 482, 172 Pac. 488; *Fry v. Salem*, 84 Or. 184, 164 Pac. 715; *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809, 813; *Jones v. Salem*, 63 Or. 126, 123 Pac. 1096.

Failure to give notice of intention to construct a sewer as expressly required is a jurisdictional defect which can not be cured by a subsequent council resolution. *Crawford v. Detroit*, 169 Mich. 293, 135 N. W. 314.

¹⁶ *Branting v. Salt Lake City*, 47 Utah 296, 153 Pac. 995.

"As statutes of this state require notice of the resolution of necessity in order that the property owners may object to the improvement or to the character thereof or of the material of which it is to be constructed, and are en-

cially where private property must bear the burden of the improvement.¹⁷

§ 1849a. Same—waiver.¹⁸

Although the notice should be defective such jurisdictional objection may be waived, and in Illinois is waived by filing further objections to the confirmation of the assessment and thus attacking the legality of the proceedings on the merits.¹⁹

§ 1850. Form, requisite and validity of notice.

Generally no particular form of notice is required, but the language must be sufficient to apprise one of ordinary intelligence of the nature of the specific improvement contemplated.²⁰

titled to a hearing thereon, this notice is said to be jurisdictional, and if not given the proceedings are invalid and void." *Benshoof v. Iowa Falls*, 175 Iowa 30, 156 N. W. 898.

¹⁷ *Shepard v. Missoula*, 49 Mont. 269, 279, 141 Pac. 544, 547, citing § 1849, vol. 4, ante.

In the absence of statute or municipal charter so requiring one whose land is assessable for improvements but not taken has no constitutional right to notice of the proceedings, however, where the municipal charter so requires without notice a valid assessment could not be laid for constitutional reasons. The charter expressly made reasonable notice a condition precedent to an assessment of benefits. *Manners v. Waterbury*, 86 Conn. 573, 86 Atl. 14.

¹⁸ See § 2119, et seq. post; § 2119, et seq. vol. 5, ante; *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173, 177.

"A party may waive a rule of law or a statute or even a con-

stitutional provision enacted for his benefit or protection where it is exclusively a matter of private right and no consideration of public policy or morals are involved, and having once done so, he cannot subsequently invoke its protection." *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569.

¹⁹ *Hooperston v. Smith*, 272 Ill. 604, 112 N. E. 266; *MacKenzie v. MacKenzie*, 238 Ill. 616, 87 N. E. 848; *Quick v. River Forest*, 130 Ill. 323, 22 N. E. 816.

²⁰ Sufficiency of. *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543; *Re Apple*, 161 Iowa, 314, 132 N. W. 1021.

Those attending meeting can not object to insufficiency of. *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543.

Publication of ordinance of necessity is sufficient notice to property owners. *Hancock v. Muskogee (Okla.)*, 175 Pac. 198.

Resolution of necessity need not

Certain laws exact in the notice named specifications,²¹ as the date of the ordinance or resolution declaring the intention or necessity or providing for the improvement,²² the proportion of the costs to be assessed against the public,²³ description of the proposed improvement,²⁴ and date, hour and place of hearing.²⁵

§ 1851. Same—description of improvement.²⁶

state all details of the contemplated improvement. *Miller v. Oelweire*, 155 Iowa 706, 136 N. W. 1045.

Need not embody entire resolution of necessity. Substantial compliance with law is sufficient. *Spalti v. Oakland*, 179 Iowa 59, 161 N. W. 17.

A statement that the council "deems it expedient and necessary to improve," is equivalent to a notice that the council proposes to improve. *Manley v. Marshfield*, 88 Or. 482, 172 Pac. 488.

Where the law prescribes no form no particular heading is required. *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809, 813, 814.

Construction of sewer system at expense of property owner. *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

Law may prescribe, and courts will not interfere. *Mansur v. Polson*, 46 Mont. 585, 125 Pac. 1002.

²¹ Size of letters in printing notice of resolution of an improvement. *Lawrence v. Portland*, 85 Or. 586, 167 Pac. 587.

Must be given as law required. *Miller v. Portland*, 62 Or. 26, 123 Pac. 64.

²² Notice must give date of ordinance providing for the improvement; merely given its number is

not sufficient. *Ferri v. Long Beach*, 176 Cal. 645, 169 Pac. 385.

²³ Laws require the notice to the property owners to state the proportion of the costs assessed against the public, and unless the notice contains this statement it is invalid. *Hoopeston v. Smith*, 272 Ill. 604, 112 N. E. 266.

²⁴ Section 1851, post; § 1851, vol. 4, ante.

Notice informing all owners and other persons interested in the proposed improvement, that the cost thereof would be assessed upon the abutting property with a description of the improvement is sufficient. *Dennis v. Williamina*, 80 Or. 486, 157 Pac. 799.

²⁵ A resolution fixing a day for the public hearing but failing to specify the hour and place is insufficient and renders the proceedings invalid. *Chicago Heights v. Angus*, 267 Ill. 628, 108 N. E. 758.

²⁶ *Gordon v. Ransome-Crummy Co.* (Cal. App.), 174 Pac. 906; *Gwilliam v. Ogden City*, 49 Utah 555, 164 Pac. 1022.

Defective. *Fry v. Salem*, 84 Or. 184, 164 Pac. 715.

Failure to describe improvement renders notice defective. *Jones v. Salem*, 63 Or. 126, 123 Pac. 1096.

Sufficiency of description of as-

§ 1852. Same—who entitled to notice.²⁷**§ 1853. Same—time.²⁸****§ 1854. Same—manner of giving.²⁹**

The manner of giving the notice provided by law, whether by newspaper publication,³⁰ posting,³¹ or by

assessment district. *Johns v. Pendleton*, 66 Or. 182, 134 Pac. 312.

Error as to reference of map may be corrected by republication of notice. *Thomas v. Petaluma* (Cal. App.), 165 Pac. 1021.

Notice of intention failed to describe the location of the proposed improvement and the materials to be used, as required by law, held defective and precluded the city from proceeding. *Davenport Locomotive Works v. Davenport* (Iowa), 169 N. W. 106.

Brief statement of the proposed improvement. *Hulton v. Newhouse* (Cal. App., 1919), 183 Pac. 276.

²⁷ *Hoops v. Omaha*, 99 Neb. 460, 156 N. W. 1047.

²⁸ *Langstaff v. Durant*, 111 Miss. 779, 72 So. 198; *Huggins v. Rackliff-Gibson Constr. Co.*, 151 Mo. App. 312, 131 S. W. 1199; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

²⁹ *Schaffer v. Smith*, 169 Cal. 764, 147 Pac. 976; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

³⁰ *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562; *Wooten v. Texas Bitulithic Co.* (Tex. Civ. App., 1919), 212 S. W. 248; *Beale v. Tacoma Park*, 130 Md. 297, 100 Atl. 379; *Langstaff v. Durant*, 111 Miss. 779, 72 So. 198.

Publication of preliminary resolution. *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995; *Rolla v. Schuman*, 189 Mo. App. 252, 257, 175 S. W. 241.

Publication of resolution of necessity, held sufficient notice. *Alley v. Muskogee*, 53 Okla. 230, 156 Pac. 315.

Publication of the ordinance declaring an intention to pave streets, specifying them, held sufficient. *Monk v. Moultrie*, 145 Ga. 843, 90 S. E. 71.

Sufficient though placed in an inconspicuous part of a newspaper in fine type and among patent medicine advertisements. *Rolla v. Schuman*, 189 Mo. App. 252, 175 S. W. 241.

Where the essentials of the order appear in the publication, mere surplusage does not vitiate it; nor will a wrong date of the making of the order. *Kansas City v. Woerishoefer*, 249 Mo. 1, 21, 22, 155 S. W. 779.

³¹ *West Berkeley Land Company v. Berkeley*, 164 Cal. 406, 129 Pac. 281.

Notices to be posted along the line of improvement. *Barber Asphalt Paving Co. v. Costa*, 171 Cal. 138, 152 Pac. 296.

By posting at each end of the line of the proposed improvement. *Miller v. Portland*, 62 Or. 26, 123 Pac. 64.

Trifling defect in posting notices of the resolution of intention to improve will not invalidate. *Gordon v. Ransome-Crummey Co.* (Cal. App.), 174 Pac. 906.

Posting, if there is no newspaper

mail,³² should be followed. Some judicial decisions adhere rather closer to form than substance.

In default of prescribed mode posting was adjudged sufficient.³³

And it has been held that the mode prescribed by statute applicable may be followed instead of the method laid down in the municipal charter.³⁴

§ 1855. Same—return of service or proof of publication.³⁵

§ 1856. Petition or consent of property owners affected.³⁶

The Arkansas Constitution makes the right to levy assessments for local improvements depend upon "the

published in the municipality. *Coleman v. Spring Const. Co.* (Cal. App., 1919), 182 Pac. 473.

³² Mailing sufficient when law so requires although some of the property owners failed to receive it. *Oak Park v. Swigart*, 262 Ill. 614, 104 N. E. 1033, 1035.

³³ *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809, 813, 814.

³⁴ *Beach v. Bellingham*, 80 Wash. 287, 141 Pac. 703.

³⁵ *Gordon v. Ransome-Crummey Co.* (Cal. App.), 174 Pac. 906.

Insufficient. *Miller v. Portland*, 62 Or. 26, 123 Pac. 64.

³⁶ *Dargatz v. Pauley*, 91 Kan. 698, 139 Pac. 419; *Jones v. Houston* (Tex. Civ. App.), 188 S. W. 688; *Burns v. Atlanta*, 22 Ga. App. 381, 96 S. E. 11 (Ga. App.), 97 S. E. 536; *Smith v. Improvement District*, 108 Ark. 141, 156 S. W. 455.

Petition of majority of the owners of real property. *Harris v. Saratoga Springs*, 156 N. Y. S. 844, 171 App. Div. 282.

Consent of owner must be evidenced by a petition of two-thirds of the persons to be taxed who

also own two-thirds in number of feet of the property fronting or abutting on the street to be improved. *California Borough v. Powell*, 50 Pa. Super. Ct. 521.

Change street grade, on petition of property owners. *Friel v. New York*, 134 N. Y. S. 1025, 150 App. Div. 317; *Burnham v. Milwaukee*, 155 Wis. 90, 143 N. W. 1067.

Petition must precede the adoption of the improvement ordinance. *Belmont Land Assn. v. Garfield Borough*, 90 N. J. L. 394, 103 Atl. 682.

Paving petition, sufficiency. *Brodt v. Yonkers*, 161 N. Y. S. 1023, 175 App. Div. 455.

Organization of park district required petition of named number of voters. Defective petition cannot be corrected by an amended petition signed by an attorney only. *People ex rel. v. Stumpf*, 275 Ill. 81, 113 N. E. 994.

Petition for improvement district, finding by council as to sufficiency of, as conclusive. *Hoops v. Omaha*, 99 Neb. 460, 156 N. W. 1047.

consent of a majority in value of the property holders owning property adjoining the locality to be affected." This provision has been construed to mean "actual or express consent of the property owners, and not an implied consent."³⁷

Under some laws the petition of the requisite number of property owners who will be affected by the proposed improvement is held to be jurisdictional,³⁸ and a condition precedent to institute the proceeding and construct the improvement.³⁹

Many laws do not require a petition to proceed with certain kinds of improvements.⁴⁰

On the contrary it has been held that such petition is not a jurisdictional prerequisite, but to proceed without is merely an irregularity.⁴¹

Legislatures, or municipal charters may and frequently

Petition of two-thirds of fronting property owners. *Avis v. Allen* (W. Va. 1919), 99 S. E. 188.

³⁷ *White v. Loughborough*, 125 Ark. 57, 188 S. W. 10, 12; *Hamilton v. Board of Improvement of Light and Water District, etc.*, 123 Ark. 327, 185 S. W. 440, 442; *Bell v. Phillips*, 116 Ark. 167, 172 S. W. 864; *Craig v. Russellville Waterworks Imp. Dist.*, 84 Ark. 390, 105 S. W. 867.

³⁸ *Stadler v. Helena*, 46 Mont. 128, 127 Pac. 454; *Hamilton v. Board of Improvement, etc.*, 123 Ark. 327, 185 S. W. 440; *Bell v. Phillips*, 116 Ark. 167, 172 S. W. 864.

Petition "is jurisdictional and the absence of such petition makes the whole proceeding void." Ordinance may require petition. *Strahan v. Ft. Gibson*, 44 Okla. 79, 143 Pac. 674.

³⁹ Petition of property owners of one-third of the lineal foot frontage required as a condition pre-

cedent to institute and make the street improvement. *Scott v. McClung*, 135 N. Y. S. 311, 150 App. Div. 794.

⁴⁰ *Batchelor v. Hammonton*, 82 N. J. L. 295, 82 Atl. 525.

Original improvements only requires petition. *Cushing v. Fleming*, 151 Mo. App. 471, 132 S. W. 52.

Repavement of a sidewalk may proceed without petition of property owners, as law making such requirement is not applicable to such case. *Wallace v. Atlanta*, 140 Ga. 649, 79 S. E. 554.

⁴¹ Law required a petition of the owners of one-fourth in value of the abutting property. "The petition is not a jurisdictional prerequisite. To proceed without petition was not to proceed without power. It was at most the exercise in an irregular manner of a power amply conferred." *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010, 1013.

do authorize certain kinds of local improvements to be made without petition or consent of property owners.⁴²

Without a petition of a specified number of property owners subject to assessments for the improvement, a prescribed vote of the legislative body is often required, as two-thirds or three-fourths, to proceed with the improvement.⁴³

§ 1857. Same—form and requisite of petition.⁴⁴

⁴² Harris v. Churchill, 152 N. Y. S. 73, 78; Van Deventer v. Long Island City, 139 N. Y. 133, 34 N. E. 774; Spencer v. Merchant, 100 N. Y. 858, 3 N. E. 682; Genet v. Brooklyn, 99 N. Y. 296, 1 N. E. 777.

⁴³ Council may by a prescribed vote create a paving district and levy special assessments for improvements therein without a petition of property owners liable to assessments. Fitzgerald v. Statler, 102 Neb. 665, 168 N. W. 599.

⁴⁴ Arkansas. Colquit v. Stevens, 111 Ark. 314, 163 S. W. 1141; Dean v. Moore, 112 Ark. 254, 165 S. W. 639; Malvern v. Nunn, 137 Ark. 418, 192 S. W. 909; Jacobs v. Paris, 131 Ark. 28, 198 S. W. 134; Buxton v. Nashville (Ark.), 201 S. W. 512.

Idaho. McQueen v. Moscow, 28 Idaho 146, 152 Pac. 799.

Illinois. People ex rel. v. Stumpf, 275 Ill. 81, 113 N. E. 995.

Kansas. Kimmerle v. Topeka, 88 Kan. 370, 128 Pac. 367.

New York. Harris v. Churchill, 152 N. Y. S. 73.

Oklahoma. Bickel v. Warner-Quinlan Asphalt Co. (Okla.), 174 Pac. 537.

Petition of consent of property owners; sufficient although it did

not state that the cost of the improvement should be charged, etc., on the real property. Mustin v. Brain (Ark. 1918), 204 S. W. 621.

Finding of the sufficiency of the petition by council. Berry v. Stillwater (Okla.), 153 Pac. 870.

Finding by municipal authorities that the petition has been signed as law requires is prima facie evidence of such fact. Pasche v. South St. Joseph Town Co., 174 Mo. App. 614, 161 S. W. 322.

Laws authorize the city council to pass upon the sufficiency of the petition by which the improvement may have been initiated. "In order to initiate a local improvement a petition is not a jurisdictional requirement in the absolute sense. That is, it is a requirement which may be waived and which the legislature could have dispensed with. Since the legislature might have authorized the improvement without requiring any petition, and it is a matter which is subject to waiver, the legislature had the power to make the action of the city council upon the sufficiency of the petition final and conclusive." Redding v. Spokane, 81 Wash. 263, 142 Pac. 664.

Signature by one tenant in common will not answer for the con-

§ 1858. Same—withdrawal of consent.⁴⁵

§ 1859. Hearing on proposed improvements.⁴⁶

Hearing at some stage of the proceedings is required to constitute due process of law where the property to be

sent of other tenants in common. In such case the petition must show that the one who signed did so not only for himself but as an agent of his co-tenants. *California Borough v. Powell*, 50 Pa. Super. Ct. 521.

Authority of corporate officers to sign. *Pasche v. South St. Joseph Town Co.*, 174 Mo. App. 614, 619, 161 S. W. 322.

Executor or trustee of an estate, and the main beneficiaries under a will may sign. *La Franchi v. Seattle*, 78 Wash. 158, 138 Pac. 659.

Description of the improvement. *Board of Improvement, etc., v. Carman* (Ark. 1919), 211 S. W. 170.

Signers required to be owners of real estate and residents of the improvement district. *Palmer v. Farmington* (N. Mex. 1919), 179 Pac. 227.

Insufficiency of petition held immaterial where the legislative body ordered the improvement by unanimous vote under a law authorizing the improvement to be ordered on a two-thirds vote. *Spokane v. Ridbath*, 74 Wash. 4, 132 Pac. 638.

⁴⁵ Petitioners may withdraw their name from the petition prior to action thereon by the proper municipal authorities, but not afterwards. *McQueen v. Moscow*, 28 Idaho 146, 152 Pac. 799, 802, referring to *Territory v. Veal*, 16 N. Mex. 340, 117 Pac. 846, 35 L. R. A. (N. S.) 1113 and note.

See § 1861, post; § 1861, vol. 4, ante.

⁴⁶ Public hearing is required. *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173; *Chicago v. Malleable Iron Co.* (Ill. 1920), 127 N. E. 349; *Chicago v. Edens*, 261 Ill. 272, 103 N. E. 996; *Oak Park v. Swigart*, 262 Ill. 614, 104 N. E. 1033; *Home-wood v. Grannis*, 265 Ill. 135, 106 N. E. 442; *Chicago v. Lamb*, 266 Ill. 134, 107 N. E. 189; *Jones v. Houston* (Tex. Civ. App.), 188 S. W. 688.

Law required hearing on proposed improvement within fifteen days after which property owners could file remonstrance. Benefit district should be fixed so property owners may know, before protest. *Schneider Granite Co. v. Independent Breweries Co.*, 258 Mo. 378, 168 S. W. 693.

First hearing on preliminary ordinance or resolution, held advisory merely. *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173, 176.

At hearing municipal authorities may change plan or scheme of proposed improvement, in which case a new resolution is necessary. *Odell v. Chicago & Alton R. Co.*, 261 Ill. 372, 103 N. E. 994.

Protest may be heard at an adjourned meeting of the council. *Farley v. Reindollar*, 174 Cal. 73, 165 Pac. 19.

See § 603, ante; § 603, vol. 2, ante.

benefited on account of the contemplated improvement must bear the burden.⁴⁷

§ 1860. Remonstrances.⁴⁸

⁴⁷ Required, where property owners must pay for the improvement. *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

Where property abutting pays, hearing is required. Laws omitting are void. Hearing is necessary to validate the tax. *Johns Hopkins Club Bldg. Co. v. Baltimore*, 130 Md. 282, 100 Atl. 298.

Whether property is benefited to the extent of the imposition, "is essentially a judicial question upon which the property owner is entitled to notice and a hearing." *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173, 176, 177.

The purpose of public hearing is to enable property owners to determine whether they will consent to or oppose the contemplated improvement, or any of the elements thereof, or proposed modifications or changes therein. "In order that property owners may form a judgment and act intelligently it is essential that they be advised what character and kind of the improvement and the materials that will enter into it, as well as the estimated cost of each of the substantial component elements. The resolution and estimate, with the public hearing, constitute the foundation for the passage of an ordinance and an assessment to pay the cost of the improvement and the preliminary proceedings required by the statute are jurisdictional and essential to the passage of a valid ordinance." *Chicago v.*

Huleatt, 276 Ill. 466, 114 N. E. 1021; *Chicago Heights v. Angus*, 267 Ill. 628, 108 N. E. 758.

⁴⁸ Remonstrance authorized. *Federal Constr. Co. v. Kneese* (Cal. App.), 174 Pac. 694; *Custer v. Springfield*, 167 Mo. App. 354, 151 S. W. 759; *Klov Dahl v. Springfield*, 81 Or. 168, 158 Pac. 668.

Qualification of signers of remonstrance. *Shaw v. Gohen*, 167 Mo. App. 125, 151 S. W. 209; *Sullwold v. St. Paul*, 138 Minn. 271, 164 N. W. 983; *Rhodes v. Koch*, 189 Mo. App. 371, 189 S. W. 641.

Authorized within a specified time, and if none presented the city may proceed. *Price v. McPherson*, 92 Kan. 82, 139 Pac. 1162.

Remonstrance should be signed by the prescribed number required by law, and so show on its face. *Klov Dahl v. Springfield*, 81 Or. 168, 158 Pac. 668.

Method of ascertaining the prescribed number of protestants. *Lais v. Silverton*, 77 Or. 434, 150 Pac. 269.

Administrator cannot sign a remonstrance. *Lais v. Silverton*, 77 Or. 434, 151 Pac. 712.

Those not affected by the proposed improvement cannot protest. *Fairchild v. Holton*, 101 Kan. 330, 166 Pac. 503. For example, a corporation occupying property owned by individuals. *Cave v. Ogden City* (Utah), 169 Pac. 163.

A law restricting the privilege of protesting against the proposed improvement to resident property

§ 1861. Same—withdrawal of protest.⁴⁹

owners affected, held constitutional, against the contention that it was special or class legislation. *Miners' Bank v. Clark*, 252 Mo. 20, 29-31, 158 S. W. 597.

Under some law it is not important that a majority of the property owners oppose a contemplated improvement. *Oak Park v. Swigart*, 262 Ill. 614, 104 N. E. 1033, 1035; *Walker v. Morgan Park*, 175 Ill. 570, 51 N. E. 636.

Notice of time and place of filing of, not always required to be given by municipal authorities. *Coleman v. Spring Const. Co.* (Cal. App. 1919), 182 Pac. 473.

Protest to be filed within the time specified otherwise it will not preclude the officers from proceeding with the improvement. *Crosslin v. Warner-Quinlan Asphalt Co.* (Okla. 1918), 177 Pac. 376.

Remonstrance to be in form and presented as required. *Shaw v. Gohen*, 167 Mo. App. 125, 151 S. W. 209; *Rhodes v. Koch*, 189 Mo. App. 371, 176 S. W. 286.

Time of protest to be prior to order that the improvement be made. *Davenport Locomotive Works v. Davenport* (Iowa), 169 N. W. 106.

Certain number protesting has effect of barring further proceedings for specified time. *City Street Imp. Co. v. Lee*, 31 Cal. App. 738, 161 Pac. 760; *Remillard v. Blake & Bilger Co.*, 169 Pac. 277, 146 Pac. 634; *Rhodes v. Koch*, 189 Mo. App. 371, 379, 176 S. W. 286.

Designated number of objectors precludes proceeding. *Lais v. Silvertown*, 82 Or. 503, 162 Pac. 251; *Cave v. Ogden City* (Utah), 169 Pac. 163; *Sharum v. Muskogee*, 43

Okla. 22, 141 Pac. 22; *Custer v. Springfield*, 167 Mo. App. 354, 151 S. W. 759.

Consideration of protests. *Will v. Bismarek*, 36 N. D. 570, 163 N. W. 550.

Procedure on objections. *Shaver v. J. W. Turner Imp. Co.* (Iowa), 133 N. W. 770.

Waiver of objections, failure to present. *Hubbell v. Des Moines*, 168 Iowa 418, 150 N. W. 701, 703.

In acting on a remonstrance substantial compliance with the law, held sufficient. *Meyer v. Bobb*, 185 Mo. App. 685, 698, 699, 171 S. W. 600; *Meyer v. Goldsmith*, 185 Mo. App. 707, 171 S. W. 606.

Finding by municipal authorities on a remonstrance, held conclusive. *Rhodes v. Koch*, 189 Mo. App. 371, 176 S. W. 286.

Contractor paid signer of remonstrance sum of fifty dollars, to withdraw opposition, held fraud on other property owners and invalidated tax bills. *McKine v. Independence*, 175 Mo. App. 332, 162 S. W. 326.

When remonstrants are presented, city council is not required to take direct action thereon, and if improvement ordinance is passed by the prescribed vote in such case, namely, two-thirds, it is sufficient to authorize the city to proceed. *Buck v. Monroe*, 85 Wash. 1, 147 Pac. 432.

Reason for overruling remonstrance that the public interest required the contemplated improvement, held sufficient. *Loth v. St. Louis*, 257 Mo. 399, 165 S. W. 1023.

⁴⁹ Section 1858, ante; § 1858, vol. 4, ante.

Signer may withdraw. *Hawley*

§ 1862. Submission to, and approval of, electors.⁵⁰

§ 1863. Mode of paying for improvements.⁵¹

The several methods of paying for local improvements

v. Butte, 53 Mont. 411, 164 Pac. 305.

Withdrawal after time has passed, held does give council authority to proceed. Hoover v. Newton (Mo. App.), 193 S. W. 895.

Withdrawing name in consideration of payment of a sum of money by the contractor, held fraud on the other property owners and rendered the tax bills void. McKine v. Independence, 175 Mo. App. 332, 162 S. W. 326.

⁵⁰ Method of calling election. Riley v. Trenton (Tex. Civ. App.), 184 S. W. 344.

When referendum to be invoked. Glove v. Willis, 16 Ariz. 378, 146 Pac. 544.

An ordinance defeated by electors, held not to preclude proper municipal authorities from proceeding with the improvement under law. Fairchild v. Holton, 101 Kan. 330, 166 Pac. 503.

Electors rejected proposition to construct a city hall and afterwards the legislative body authorized it which was sustained as a result of the construction of the particular laws applicable. Fuller v. Haines, 224 Mass. 176, 112 N. E. 873.

Special assessments for improvements may be voted by electors. Ainsworth v. Arizona Asphalt Paving Co., 18 Ariz. 242, 158 Pac. 428.

Resolution to open a street, held could not be referred to voters. Starbuck v. Fullerton (Cal. App.), 168 Pac. 583.

When improvements to be paid for by bond issue question is to be submitted to electors. Byrns v. Moscow, 21 Idaho 398, 121 Pac. 1034.

Provision as to vote of electors on improvements, held applicable only to those of the general nature affecting all of the voters of the municipality and not to an ordinance creating an improvement district. Hodges v. Board of Improvement of Water Works, etc., 117 Ark. 266, 174 S. W. 542.

To acquire water supply system. Matthews v. Ellensburg, 73 Wash. 272, 131 Pac. 839.

For construction of a municipal electric railway. State v. Superior Court, 77 Wash. 593, 138 Pac. 277.

Contract of lighting streets for a ten year period, held could only be sanctioned by a majority vote of the qualified electors, because such contract is of the nature of a bond debt. Fowler v. Fountain Inn, 90 S. C. 352, 73 S. E. 626, following Duncan v. Charleston, 60 S. C. 532, 39 S. E. 265.

⁵¹ Georgia. Waycross v. Tomberlin, 146 Ga. 504, 91 S. E. 560.

Idaho. Byrns v. Moscow, 21 Idaho 398, 121 Pac. 1034.

Illinois. McGovern v. Chicago, 281 Ill. 264, 118 N. E. 3, affirming 202 Ill. App. 139; Inter Ocean Newspaper Co. v. West Hammond, 189 Ill. App. 110; The Rienzi Co. v. Lincoln Park Commissioners, 198 Ill. App. 218; Mosiman Plumbing Co. v. Pocahontas, 199 Ill. App. 211.

are by special assessments or taxation,⁵² by general taxation, or out of the general municipal revenue,⁵³ or by

Minnesota. *State v. Ely*, 129 Minn. 40, 151 N. W. 545.

Missouri. *Kansas City v. Woerishoeffer*, 249 Mo. 1, 155 S. W. 779; *Mound City v. Melvin* (Mo. App.), 205 S. W. 254.

New York. *R. G. Packard Co. v. New York*, 137 N. Y. S. 9, 151 App. Div. 941; *Spencer v. New York*, 166 N. Y. S. 177, 179 App. Div. 69.

Texas. *Sayles v. Abilene* (Tex. Civ. App.), 196 S. W. 1000.

Washington. *Buck v. Monroe*, 85 Wash. 1, 147 Pac. 432.

Ordinance providing for to specify method of payment. *Hoopes-ton v. Smith*, 272 Ill. 604, 112 N. E. 266.

Ordinance authorizing improvement containing illegal proceedings as to payment is wholly void, since it is manifest that the means and method for payment of the obligations contemplated are essential features of the ordinance and, if illegal, invalidate the entire ordinance. *McAndrew v. Dunmore Borough*, 245 Pa. 101, 91 Atl. 237.

Council has sole power to determine what proportion of the special tax to be levied for an improvement shall be paid by the public, and courts cannot review it. *Lovington v. Gregory* (Ill. 1919), 122 N. E. 504.

⁵² *Langstaff v. Durant*, 111 Miss. 790, 72 So. 236; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

By special assessment. *Morrison v. Chicago & N. W. Ry. Co.*, 257 Ill. 376, 100 N. E. 991; *Peittergrew v. Sioux Falls*, 35 S. D. 78, 150 N. W. 772.

Whole cost of street improvement to be paid by taxation of abutting property. The decision of the council is conclusive. *Watseka v. Oredaugh*, 266 Ill. 579, 107 N. E. 887, 889.

Half of cost against abutting owner. *Dennis v. Williamina*, 80 Or. 486, 157 Pac. 799.

Sidewalk construction and repair charged against abutting property. *Abbott v. Milwaukee*, 148 Wis. 22, 134 N. W. 136.

Expense in establishing lighting district may be assessed against property determined to be thereby benefited. *Parker v. Wallace*, 142 N. Y. S. 523, 80 Misc. Rep. 425.

Under provision of law that the entire expense of paving, with named exceptions, shall be assessed against abutting property, the municipality may provide for defraying the expenses of paying in front of United States property out of the general revenue. *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004.

By property benefited, one-half and one-half out of general revenue. *Appeal of Ransom*, 149 N. Y. S. 1056, 87 Misc. Rep. 1.

Provision for payment of local improvement by special assessments, held not exclusive under a particular statute. *Booth v. Midvale City* (Utah 1919), 184 Pac. 799, 802, quoting with approval part of § 1863, vol. 4, ante.

⁵³ After opening street to be improved at expense of general revenue. *Peoria v. Peoria R. Co.*, 274 Ill. 48, 113 N. E. 170.

Condemnation of an alley to be

bond issue,⁵⁴ or under some laws as otherwise provided by ordinance, the ordinance to specify the method of payment.⁵⁵

If the applicable law provides several modes of payment, the adoption of one mode of payment excludes the idea of payment in any other mode.⁵⁶

§ 1864. Agreements of citizens and property owners to pay for improvements.⁵⁷

§ 1865. Sufficiency of ordinance relating to payments in installments.⁵⁸

paid for by general taxation. *Norris v. Lyon*, 251 Ill. 457, 96 N. E. 236.

Street intersections to be paid for entirely by special taxation, or so in part, and if in part only, what proportion shall be paid by special taxation and what part by general taxation—all of which questions are for determination by the municipality under particular law. "It is insisted that in the improvement of streets to be paid for by special taxation the law contemplates that the municipality shall pay for the improvement of street intersections. In such case the city council has the sole power of determining whether the improvement shall be paid for wholly by special taxation or in part only, and, if in part only, what proportion shall be paid for by special taxation and what proportion by general taxation. *City of St. Louis v. Illinois Central R. Co.*, 238 Ill. 296, 87 N. E. 407; *City of Peru v. Bartels*, 214 Ill. 515, 73 N. E. 755; *Birket v. City of Peoria*, 185 Ill. 369, 57 N. E. 30. Land in the middle of a block is not contiguous to the street intersection,

but it is contiguous to the improvement, and all land contiguous to the improvement is property assessed for its share of the cost of the whole improvement, including intersections of streets." *Kankakee v. Illinois Central R. Co.*, 258 Ill. 368, 101 N. E. 592, 594.

⁵⁴ *Schaffer v. Smith*, 169 Cal. 764, 147 Pac. 976.

Under law authorizing the construction of streets, highways, alleys, sewers and public place on a bond plan, held sidewalks could not be so constructed, since "street" as used in the law did not include "sidewalk." *Barry v. Cloverport*, 175 Ky. 548, 194 S. W. 818.

See §§ 1286, 1829, ante; § 1286, vol. 3, ante; § 1829, vol. 4, ante.

⁵⁵ *Merchants' Loan & Trust Co. v. Chicago*, 264 Ill. 76, 105 N. E. 726, affirming 182 Ill. App. 298.

⁵⁶ *Gray v. Joliet* (Ill. 1919), 122 N. E. 550; *Chicago v. Thomasson*, 259 Ill. 322, 102 N. E. 748.

⁵⁷ *Remillard v. Blake & Bilger Co.*, 169 Cal. 277, 146 Pac. 634; *Charlotte v. Alexander*, 173 N. C. 505, 92 S. E. 384.

⁵⁸ *Bradley v. New York Cent. R. Co.*, 277 Ill. 608, 115 N. E. 640,

§ 1866. Estimate of cost of the improvement.⁵⁹

The requirement of the estimate of the cost of the improvement when assessed against private property (not applicable, however, under some laws to all kinds of improvements),⁶⁰ is generally regarded as mandatory and jurisdictional.⁶¹

The officer or individual authorized to make the es-

643; *Peittergrew v. Sioux Falls*, 35 S. D. 78, 150 N. W. 772.

Supplemental ordinance. *Geneseo v. Schultz*, 257 Ill. 273, 100 N. E. 926.

⁵⁹ *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381; *Ramson v. Minick*, 92 Kan. 953, 142 Pac. 934; *Branting v. Salt Lake City*, 47 Utah 296, 153 Pac. 995; *Kasch v. Akron* (Ohio 1919), 126 N. E. 61, 63.

In making, honest and fair judgment should be exercised. *Sasse v. Barkwell* (Mo. App.), 195 S. W. 542.

Estimate exceeding cost, method of computation. *Gratz v. Kirkwood*, 182 Mo. App. 581, 183 S. W. 1071; *Stover v. Springfield*, 167 Mo. App. 328, 336, 152 S. W. 122; *Gratz v. Kirkwood*, 165 Mo. App. 196, 145 S. W. 874.

An assessment is void as to any sum in excess of the published estimate of the cost. *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010, 1013, following *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768, and adhered to in *Chehalis v. Cory*, 64 Wash. 367, 116 Pac. 875.

See §§ 1910 and 2094, post; § 1910, vol. 4, ante; § 2094, vol. 5, ante.

⁶⁰ *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S.

W. 276; *Youmans v. Everett*, 173 Mo. App. 671, 160 S. W. 274.

Repairs of sidewalks permitted without preliminary estimate. *Abbot v. Milwaukee*, 148 Wis. 22, 134 N. W. 136.

Inapplicable for the construction of filtration plants and like buildings. *Price v. Fargo*, 24 N. D. 440, 139 N. W. 1054, 1058-1061.

Completion of grading work almost finished without estimate of costs authorized. *Hilger v. Nebraska City*, 97 Neb. 268, 149 N. W. 807.

⁶¹ *Chicago v. Malleable Iron Co.* (Ill. 1920), 127 N. E. 349; *Lovington v. Gregory* (Ill. 1919), 122 N. E. 504, 506; *Maryville v. Cox*, 181 Mo. App. 254, 167 S. W. 1166.

"The requirement of the statute as to the engineer's estimate of the cost of the improvement is mandatory." *Chicago Heights v. Angus*, 267 Ill. 628, 108 N. E. 758, following *Bickerdike v. Chicago*, 203 Ill. 636, 68 N. E. 161.

If the law does not make the filing of estimate a condition precedent to the passage of the improvement ordinance or the letting of the contract, failure will not invalidate the tax bills. *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S. W. 276.

timate,⁶² and the time of making and filing,⁶³ is directed by the law applicable and its proper construction. The sufficiency of the estimate,⁶⁴ whether it should be itemized, and the component elements given,⁶⁵ or whether an es-

⁶² When mayor is named in the law to make the estimate, he may consult an engineer, and adopt in whole or in part such engineer's estimate as his own. *Gratz v. Kirkwood*, 182 Mo. App. 581, 166 S. W. 319.

Estimates are usually required to be made by a municipal officer or officers acting pursuant to his public duty, under the sanction of his official oath. *Gratz v. Kirkwood*, 182 Mo. App. 581, 166 S. W. 319.

Estimate prepared by assistant to city engineer who supervised the work, held valid. *Manefee v. Taubman*, 159 Mo. App. 318, 325, 140 S. W. 604.

Delegating preparation of plans and estimates. *Barber Asphalt Paving Co. v. O'Brien*, 128 Mo. App. 267, 107 S. W. 25.

By city engineer applicable to second class cities in Nebraska, not to villages as they have no "city engineer." *Gibson v. Troupe*, 96 Neb. 770, 148 N. W. 944.

Not made by city engineer, held valid. *Diederick v. Red Cloud* (Neb. 1919), 173 N. W. 698, distinguishing *County Comrs. v. Davis*, 92 Kan. 672, 141 Pac. 555, L. R. A. 1915A, 198.

⁶³ Prior to contract. *Sasse v. Barkwell* (Mo. App.), 195 S. W. 542; *Webb City v. Aylor*, 163 Mo. App. 155, 147 S. W. 214.

Estimate on file when the improvement ordinance was passed.

Maret v. Hough (Mo. App.), 185 S. W. 544.

Estimate of cost of installing in the well of a water plant a motor-driven pump, before contracting for the plant. *Arnhold v. Klug*, 97 Kan. 576, 155 Pac. 805.

Excess of 25% to be paid out of general revenue. Costs computed after completion of work. *Williams v. St. Paul*, 123 Minn. 1, 142 N. W. 886.

At the time of the initiation of the improvement estimate to be made of the cost and the expense incident. If the estimate is too high the excess shall be rebated, and if too low the deficit shall be added to the assessment. *Vincent v. South Bend*, 83 Wash. 314, 145 Pac. 452.

⁶⁴ *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 172 S. W. 436; *Maryville v. Cox*, 181 Mo. App. 254, 257-259, 167 S. W. 1166; *Carlson v. South Omaha*, 91 Neb. 215, 135 N. W. 1047, 1049.

An estimate that "the work should be done at a cost not to exceed \$1.47 per square yard," has been held sufficient against the contention that it was too vague and uncertain in its terms. *Boonville v. Stephens*, 238 Mo. 339, 355, 141 S. W. 1111, reversing 95 S. W. 309, and distinguishing *Boonville v. Rogers*, 125 Mo. App. 142, 150, 101 S. W. 1120.

⁶⁵ Insufficient itemization of combined curb and gutter. *Waukegan v. Wetzel*, 261 Ill. 498, 104 N.

timate in gross will answer,⁶⁶ especially in the absence of

E. 184, distinguishing *Chicago & W. Ind. R. R. Co. v. Chicago*, 230 Ill. 9, 82 N. E. 399, and *Hulbert v. Chicago*, 213 Ill. 452, 72 N. E. 1097.

"Shall be itemized to the satisfaction of the board." At public hearing estimate may be modified. *Marion v. Sisney*, 252 Ill. 421, 96 N. E. 860.

Need not make separate estimate of the cost of the different items required to make up the completed whole. *Wurdeman v. Columbus*, 100 Neb. 134, 158 N. W. 924.

Item "lawful expenses," need not give component elements. *Park Ridge v. Wisner*, 253 Ill. 360, 97 N. E. 677, following *Gage v. Wilmette*, 230 Ill. 428, 82 N. E. 656, and *East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674.

Details not required. It is not necessary to set out in minute detail all the items of labor and material which go into the improvement. *Ladd v. Chicago, O. & P. Ry. Co.*, 283 Ill. 260, 119 N. E. 276, reviewing many Illinois cases.

"An estimate of the cost of an improvement is sufficiently itemized if it is so specific as to give property owners a general idea of the cost of the substantial, component parts of the improvement." *East St. Louis v. Vogel*, 276 Ill. 490, 114 N. E. 941, 944; *Chicago v. Underwood*, 258 Ill. 116, 101 N. E. 261; *Connecticut Life Ins. Co. v. Chicago*, 217 Ill. 352, 75 N. E. 365; *Oak Park v. Galt*, 231 Ill. 482, 83 N. E. 212; *Chicago v. Gage*, 237 Ill. 328, 86 N. E. 633; *Waukegan v. Burnett*, 268 Ill. 448, 109 N. E. 277, 279, following *Chicago v. Soukup*, 245 Ill. 634, 92 N. E. 564, and

Hulbert v. Chicago, 213 Ill. 452, 72 N. E. 1097.

Component elements. The purpose of the estimate is to advise property owners as to what the improvement will probably cost, and therefore it should be sufficiently itemized as to show separately the cost of the substantial component elements. An estimate of costs is sufficiently specific if it gives property owners a general idea of the cost of the several items of the improvement. It is not the purpose of the estimate to determine the character of material that will be necessary for the improvement. *Chicago v. Huleatt*, 276 Ill. 466, 114 N. E. 1021; *Chicago v. Underwood*, 258 Ill. 116, 101 N. E. 261.

Material for gutters. In estimating cost of a street pavement where the material entering into the construction of the pavement is identical with that of the gutters, and as the gutters do not form separate, essential, component elements of the improvement, it would therefore serve no useful purpose to have the cost of the gutters itemized separately. Where the gutters are of different material from the pavement they form a separate, substantial, component element of the improvement, and should be itemized separately from the pavement. *Park Ridge v. Wisner*, 253 Ill. 360, 97 N. E. 697, following *Hulbert v. Chicago*, 213 Ill. 452, 72 N. E. 1097.

Labor. "The estimate did not separately state the cost of the labor in construction, but the estimate states generally that it in-

exaction of the applicable law of itemization,⁶⁷ is to be determined by the terms of the local law.

§ 1867. Provision for means of payment.⁶⁸

§ 1870. Preliminary ordinance or resolution.⁶⁹

In many improvements the first step is a preliminary ordinance or resolution declaring the intention to make

cludes all labor, materials, and all other expenses attending the making of the improvement. Where such a statement is contained in the estimate the cost of labor need not be stated in a separate item." *Waukegan v. Burnett*, 268 Ill. 448, 109 N. E. 277, following *Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874, and *Gage v. Wilmette*, 230 Ill. 428, 82 N. E. 656.

⁶⁶ **Gross sum.** "The statute does not require the estimate to be itemized so as to cover the probable cost of the different items to be used in the work. Its language is plain and simple, and the most that can be said of it is that it calls for an estimate of the cost expenses. It does not matter so much to the property owner or taxpayer what the expense of each item entering into a given pavement may be as it does what will be the sum total of its cost and the service it will render, nor does the statute provide for what method the engineer shall arrive at his estimate. There are a number of items to be taken into account in determining the probable cost of a job of paving. It is for the city engineer to make an estimate of the sum total of these items. The bidders will figure the items. One contractor may calculate the cost of grading

at one price and another at a different price. One may figure the cost of material at a different price from another, and so it is with each separate item of the improvement. The estimate fell within the provisions of the statute and error cannot be predicated upon the ruling of the cost thereon." *Wurde-man v. Columbus*, 100 Neb. 134, 158 N. W. 924, 925.

⁶⁷ All estimate in gross is sufficient unless the applicable law requires itemization. *South Park Comrs. v. Wood*, 270 Ill. 263, 110 N. E. 349, 353.

Lump sum of cost of street improvement, held sufficient. Itemized estimate is not required. *Frazier v. Rockport*, 199 Mo. App. 80, 202 S. W. 266, 269.

⁶⁸ *Morrison v. Chicago & N. W. Ry. Co.*, 257 Ill. 376, 100 N. E. 991.

Where cost was to be raised by sale of bond, the fact they had not been sold is not material. *Atlantic Bitulithic Co. v. Edgewood*, 76 Va. 630, 87 S. E. 183, 185.

⁶⁹ *Safe Deposit & Trust Co. v. Baltimore*, 121 Md. 522, 88 Atl. 267; *Blair v. Glenn*, 187 Mo. App. 392, 172 S. W. 1195; *Maryville v. Cox*, 181 Mo. App. 254, 167 S. W. 1166.

⁷⁰ *Dillon v. Beacom*, 67 Or. 118, 134 Pac. 778, 135 Pac. 336; *Clyde v.*

the specified improvement,⁷⁰ or declaring the proposed improvement expedient or the existence of a necessity therefor.⁷¹

Many local laws so require.⁷²

Under some laws the passage and publication of the preliminary ordinance or resolution is mandatory and jurisdictional.⁷³

Moscow, 23 Idaho 592, 131 Pac. 381; Southern Surety Co. v. Jay (Okla. 1919), 178 Pac. 95; Cooper v. Bozeman, 54 Mont. 277, 169 Pac. 801.

Resolution of board of local improvements is first step. Chicago v. Huleatt, 276 Ill. 466, 114 N. E. 1021.

Declaratory ordinance of intention gives notice of the intention to make the improvement and initiates the proceedings. Designated definitely the nature of the proposed improvement, district, that the cost of the improvement would be assessed against benefited property, etc., held sufficient. Collins v. Ellensburg, 68 Wash. 212, 122 Pac. 1010.

Where the applicable law prescribes the procedure, an ordinance fixing the method is not required. Miller v. Oelwein, 155 Iowa 706, 136 N. W. 1045, 1047.

⁷¹ Section 1871, post; § 1871, vol. 4, ante.

⁷² Preliminary resolution or ordinance required for "reconstruction" but not "repair." Ranney v. Cape Girardeau, 185 Mo. App. 229, 233, 170 S. W. 342; Noel v. Lees Summit, 166 Mo. App. 114, 148 S. W. 194. See § 2030.

Resolution of intention is usually required only where private property is bound for the payment

of the work, in whole or in part. "The resolution of intention * * * where private property is to be held for the payment of the work is the initial step by which jurisdiction is acquired. * * * Where the mode is thus prescribed any radical departure from it results in a void contract." Osburn v. Stone, 170 Cal. 480, 150 Pac. 367, 369, 370.

⁷³ "The resolution is for the prime benefit of the owners whose property is to be taxed to pay for the improvement and its publication calls on such property owner to decide whether the work shall go on with his consent or whether he shall file a remonstrance. The resolution affords him an opportunity to be heard on the subject of the necessity and wisdom of the proposed improvement and, therefore, it is indispensable that he should have accurate information. Should the subsequent ordinance and contract for the improvement deviate materially from the resolution the whole proceeding will be void for the reason that the property owners have been deprived of the right the law intends they should have to be informed at the start of the true nature of the improvement for which they are to pay. Should we find that the resolution under consideration told the

The preliminary resolution or ordinance declaring the intention or necessity should be sufficiently specific in its terms to give ample notice to the property owners affected at least of the general nature of the improvement,⁷⁴

property owners, in effect, that the work of paving the street included all necessary grading and that the entire work would be done at a maximum cost of two dollars per square yard, we would hold it would not support the subsequent proceedings ending in a contract which relieved the contractor of the burden of grading.

"On the other hand if we should find that the resolution dealt only with the subject of paving a street already graded to the established grade and was not intended to include grading necessary to bring the street to such grade, we must hold the resolution sufficient. If the resolution for paving and the plans and specifications to which it refers are silent on the subject of grading the law will imply a duty on the part of the city to furnish a graded street to the contractor. (*Hilgert v. Barber*, 107 Mo. App. 1, c. 388; *Ash v. Independence*, 79 Mo. App. 74.) And a property owner would not be justified in thinking that the burden of such duty was included in the work proposed by the resolution." *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 401, 402, 160 S. W. 276.

⁷⁴ *West Berkeley Land Company v. Berkeley*, 164 Cal. 406, 129 Pac. 281; *Federal Construction Co. v. Kneese* (Cal. App.), 174 Pac. 694; *Thoits v. Byxbee* (Cal. App.), 167 Pac. 166; *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 172 S.

W. 436; *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

Should substantially inform the public of the kind and character of the improvement intended; specific description not necessary. *Fellows v. Dorsey*, 171 Mo. App. 289, 298, 299, 157 S. W. 995; *Custer v. Springfield*, 167 Mo. App. 354, 362, 151 S. W. 759.

Sufficient if preliminary resolution describes the portion of the street to be improved, what the improvement is to be and recites that it shall be done in accordance with plans, specifications and the general improvement ordinance. *Blair v. Glenn*, 187 Mo. App. 392, 395, 172 S. W. 1195.

Failure to describe the improvement is fatal. *Garner v. Anniston*, 2 Ala. App. 389, 56 So. 874.

Preliminary ordinance giving the improvement in its title, held sufficient. *Birmingham v. Abernathy*, 178 Ala. 221, 59 So. 180.

See § 812, vol. 2, ante.

Resolution stating generally the character of the contemplated improvement without a detailed description thereof, held sufficient. *Mansur v. Polson*, 45 Mont. 585, 125 Pac. 1002, 1004.

Board in first resolution fixed a day for a public hearing but failed to name the hour and place, held did not comply with the law, and that it could not be presumed that the officers "fixed an hour and place in the notices required by law to be made with reference to such

the private property subject to the expense should be suf-

hearing. Any attempt by such public officials to supply the omission on the hearing is ineffectual." *Chicago Heights v. Angus*, 267 Ill. 628, 108 N. E. 758, 759.

"The resolution should state directly or by reference the nature and character of the improvement, otherwise the proceedings are without jurisdiction. The resolution * * * is for the information and benefit of owners whose property is to be taxed for the proposed improvement." *Poplar Bluff v. Bacon*, 144 Mo. App. 476, 129 S. W. 466.

"The property owner must look to the resolution and to the sources of information therein pointed out in order to ascertain that the city council proposed to do. * * * This resolution * * * should either be explicit in itself, or inform the property owner where they can ascertain exactly what is proposed." *Webb City v. Aylor*, 163 Mo. App. 155, 164, 147 S. W. 214.

It should state the name of street, etc., to be improved and give a general description of the character of the improvement to be made that the public interest and convenience require it, and state a time or place of hearing to consider objections, etc. *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381.

"The proceedings being in invitum the resolution of intention must describe, with reasonable clearness, the work to be done, otherwise the contractor cannot recover, whatever may have been

his good faith in doing the work, or however much money he may have spent." *Barber Asphalt Paving Co. v. Christ*, 21 Cal. App. 1, 130 Pac. 435, 436, holding specification as to material and description sufficient.

Ordinance of intention recited: "The character of the proposed lateral sewer system shall be of that gravity according to the plans and specifications now in the office of the city engineer," etc., held sufficient. *Dement v. Caldwell*, 22 Idaho 62, 125 Pac. 200, approving and following *Williams v. Caldwell*, 19 Idaho 514, 114 Pac. 519. These cases approved in *Caldwell v. Mountain Home*, 29 Idaho 13, 156 Pac. 909, 912.

Sewer, giving the boundaries of district, and directing its publication, the preparation of plans and specifications and estimates of the contemplated improvement, held sufficient. *Ransom v. Minick*, 92 Kan. 953, 142 Pac. 934.

Detailed description of the work to be done is not required, but it may be given by reference to the plans and specifications. *Richmond Constr. Co. v. Growney*, 29 Cal. App. 427, 155 Pac. 1008.

Should describe the grading, but it may be made by reference to another ordinance and profile. *Maryville v. Cox*, 181 Mo. App. 254, 257, 167 S. W. 1166; *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 400, 160 S. W. 276.

Resolution of intention may refer to a street by the name it is commonly known as law applicable permitted. Failure to mention the

ficiently described,⁷⁵ and also the material to be used in the construction of the work.⁷⁶

§ 1871. Declaration of necessity for improvement.⁷⁷

The preliminary resolution of necessity, required by many laws, confers jurisdiction to proceed.⁷⁸

official name is not fatal. *Federal Constr. Co. v. Kneese* (Cal. App.), 174 Pac. 694.

Resolution failing to describe street to be improved, and plans referred to, also fail to do so, is insufficient. *Park v. Pacific Fire Extinguisher Co.* (Cal. App.), 173 Pac. 615.

Pavement, may be by brief description and reference to plans and specifications on file. *Beale v. Santa Barbara* (Cal. App.), 162 Pac. 657.

See § 1886, post; § 1886, vol. 4, ante.

⁷⁵ First resolution need not describe property to be condemned, when. *Chicago v. Sullivan Machinery Co.*, 269 Ill. 58, 109 N. E. 696, 700.

Should set out in general terms the property liable for the cost of the improvement. *Newport v. Lang*, 162 Ky. 752, 172 S. W. 1071.

Resolution of intention to extend a street over named tide lands did not specify the lands to be affected, but such information was obtainable from official maps, held sufficient. *West Berkeley Land Co. v. Berkeley*, 164 Cal. 406, 129 Pac. 281.

Resolution of intention is not insufficient because of failure to describe the kind of wood to be used in the construction of "wooden bridges." *Remillard v. Blake &*

Bilger Co., 169 Cal. 277, 146 Pac. 634, following *Deady v. Townsend*, 57 Cal. 298, and *Harney v. Heller*, 47 Cal. 15.

⁷⁶ Preliminary resolution, void if it fails to describe the work to be done or the material to be used. *Phoenix Brick & Const. Co. v. Gentry Co.*, 257 Mo. 392, 166 S. W. 1034, approving *Kirksville v. Coleman*, 103 Mo. App. 215, 77 S. W. 120, disapproving *Delmar Investment Co. v. Lewis*, 180 Mo. App. 22, 162 S. W. 675. The following support the rule: *Schulte v. Currey*, 173 Mo. App. 578; *Custer v. Springfield*, 167 Mo. App. 354; *Webb City v. Aylor*, 163 Mo. App. 155; *Coulter v. Phoenix Brick & Const. Co.*, 131 Mo. App. 230; *Barber Asphalt Paving Co. v. O'Brien*, 128 Mo. App. 267.

Preliminary resolution gave a general description of the nature of the work to be done in paving, curbing and guttering the street, and set forth the materials in general terms, concluding "all of which shall be shown by plans and specifications therefor which are now on file in the office of the city clerk." Held sufficient. *Reinert Bros. Constr. Co. v. Whitmer* (Mo. App.), 206 S. W. 387.

⁷⁷ Declaration of necessity, required to be published. *Enid v. Gensman* (Okla. 1919), 181 Pac. 308.

⁷⁸ Illinois. *Oak Park v. Chicago*

Often the finding of the existence of necessity or convenience is regarded as a jurisdictional fact.⁷⁹

& W. T. Ry. Co., 285 Ill. 459, 120 N. E. 761.

Iowa. *Re Apple*, 161 Iowa 314, 142 N. W. 1021; *Spalti v. Oakland*, 179 Iowa 59, 161 N. W. 17; *Davenport Locomotive Works v. Davenport (Ia.)*, 169 N. W. 166; *Bloomfield v. Stanley*, 174 Iowa 114, 156 N. W. 307; *Miller v. Oelwein*, 155 Iowa 706, 136 N. W. 1045; *Dunker v. Des Moines*, 156 Iowa 292, 136 N. W. 536.

Kansas. *Price v. McPherson*, 92 Kan. 82, 139 Pac. 1162.

Kentucky. *Mulligan v. McGregor*, 165 Ky. 222, 176 S. W. 1129.

Michigan. *Crawford v. Detroit*, 169 Mich. 293, 135 N. W. 314; *Knick v. Grand Rapids*, 200 Mich. 582, 166 N. W. 979.

Missouri. *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995; *Schulte v. Currey*, 173 Mo. App. 578, 586, 158 S. W. 888; *Webb City v. Aylor*, 163 Mo. App. 155, 164, 147 S. W. 214.

New York. *Goodale v. New York*, 148 N. Y. S. 1076, 88 Misc. Rep. 603; *Hotchkiss v. Binghamton*, 211 N. Y. 279, 105 N. E. 410, reversing 132 N. Y. S. 933, 148 App. Div. 533.

North Dakota. *Stoltze v. Sheridan*, 28 N. D. 194, 148 N. W. 1.

Oklahoma. *Bickel v. Warner-Quinlan Asphalt Co. (Okl.)*, 174 Pac. 537; *Orr v. Cushing (Okl.)*, 168 Pac. 223; *Alley v. Muskogee (Okl.)*, 156 Pac. 315.

United States. *Hipple v. Bates County*, 223 Fed. 22, 138 C. C. A. 436.

Resolution declaring it "expedient and necessary," to grade a named street which was published, held sufficient. *Burkley v. Omaha*, 102 Neb. 308, 167 N. W. 72.

"Adjacent property" to be assessed for the improvement (sewer) to be designated. *Dunker v. Des Moines*, 160 Iowa 567, 142 N. W. 207, 208; *Delmar Investment Co. v. Lewis*, 271 Mo. 317, 196 S. W. 1137, reversing 180 Mo. App. 22, 162 S. W. 675, holding resolution indefinite as to proposed work.

When property owner estopped to question sufficiency of resolution of necessity by failure to object at proper time. *Miller v. Oelwein*, 155 Iowa 706, 136 N. W. 1045.

To be passed after plans, specifications and estimates shall have been filed and approved and then published. *Will v. Bismarck*, 36 N. D. 570, 163 N. W. 550.

Sufficiency of publication. *Rawlins v. Warner-Quinlan Asphalt Co. (Okl.)*, 174 Pac. 526.

⁷⁹ *Kasch v. Akron (Ohio 1919)*, 126 N. E. 61, 63.

Declaration of necessity, held mandatory and jurisdictional. *Kvello v. Lisbon*, 38 N. D. 71, 164 N. W. 305.

Such resolution necessary to confer jurisdiction. *Wheeler v. Muskogee (Okl.)*, 151 Pac. 635.

Finding that a necessity for the construction of a sewer exist is required under a charter authorizing the establishment of "necessary" sewers only. "No presumption that it was found to be necessary

On the other hand, it has been held that "public necessity" need not be declared to exist; a resolution that the council "deemed it advisable" to construct the sewer involved, in the language of the applicable law, is sufficient.⁸⁰

So, that the passage of an ordinance requiring construction, is in itself a finding of necessity.⁸¹

§ 1872. Plans and specifications.⁸²

The filing of proper plans and specifications is free can be based upon the fact that the petition for it was acted upon favorably." *Fisher v. St. Albans*, 87 Vt. 524, 90 Atl. 582, following *Kent v. Enosburg Falls*, 71 Vt. 255, 44 Atl. 343.

⁸⁰ *Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 184 Mich. 681, 151 N. W. 649, 651.

⁸¹ *Wood v. Hurley*, 29 S. D. 269, 136 N. W. 107, 109, 110.

The necessity for the extension of a street is a legislative rather than a judicial question and the determination thereof may be vested in the appropriate local authorities. *Ashley v. Minneapolis, St. Paul and S. S. M. Ry. Co.*, 37 N. D. 147, 163 N. W. 727, 729, approving *Grafton v. St. Paul & Manitoba Ry. Co.*, 16 N. D. 313, 113 N. W. 598, 22 L. R. A. (N. S.) 1.

Court will not review finding by the municipality that paving and drainage repairs are necessary, in the absence of fraud or bad faith. *Johns Hopkins Club Bldg. v. Baltimore*, 130 Md. 282, 100 Atl. 298. Section 1835, ante; § 1834, et seq., vol. 4, ante.

⁸² *California. Thoits v. Byxbee* (Cal. App.), 167 Pac. 166.

Illinois. Staunton v. Bond, 281 Ill. 568, 118 N. E. 47.

Kansas. Ranson v. Minick, 92 Kan. 953, 142 Pac. 934.

Missouri. Albers v. Acme Paving & Crusher Co., 196 Mo. App. 265, 194 S. W. 61; *Maret v. Hough* (Mo. App.), 185 S. W. 544; *Parker-Washington Co. v. Clinton*, 155 Mo. App. 382, 137 S. W. 28; *Mullins v. Everett*, 172 Mo. App. 186, 157 S. W. 823; *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995; *Probert v. Girard Investment Co.*, 155 Mo. App. 344, 137 S. W. 41.

Washington. Spokane v. Ridpath, 74 Wash. 4, 132 Pac. 638.

Discretion as to. *Shreveport v. Chatwin*, 139 La. 531, 71 So. 791.

Discretion as to method of improvement. *Kirksville v. Ferguson*, 262 Mo. 661, 172 S. W. 4.

Who to prepare specifications under particular ordinance. *Juxthelmer v. Sharpsville Borough*, 238 Pa. 42, 85 Atl. 994, 999.

Plans, etc., prepared by assistant engineer and adopted by city engineer. *Manefee v. Taubman*, 159 Mo. App. 318, 140 S. W. 604.

Time of filing. *Wills v. Burbank*, 182 Mo. App. 68, 167 S. W. 608; *Schulte v. Currey*, 173 Mo. App. 578, 589, 158 S. W. 888.

Need not be filed before advertising for bids. "Such plans and

quently held to be mandatory,⁸³ depending, it is true, on the precise steps taken by the municipal authorities,⁸⁴ and the intent of the law applicable.⁸⁵

The purpose, of course, is to impart definite information to prospective bidders as to the improvement, to prevent favoritism and corruption in letting the work, and to give the owners of property who must pay for the improvement notice that they may protest, if they desire to do so.⁸⁶

specifications are for the purpose of entering into a contract, and not for the purpose of advising the property owners of the nature of the proposed improvement." *Miller v. Oelwein*, 155 Iowa 706, 135 N. W. 1045, following *Nixon v. Burlington*, 141 Iowa 316, 115 N. W. 239, 18 Ann. Cas. 1037.

The right to object that no plans and specifications were filed prior to the passage and publication of the ordinance of intention as required, is waived by failure to appear and object before the council in response to due notice. *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010, 1013.

Plans and specifications were prepared and filed before the publication for bids and gave the dimensions including the width of the sidewalk. The notice to bidders referred to the plans and specifications and the sidewalk constructed conformed to them. Held, there was no legislative authority conferred on the engineer, but in the improvement the plans and specifications were treated as having been made a part of the ordinance. *California v. Kiesling* (Mo. App.), 180 S. W. 559.

Commission on city plans; question of delegation of power to, discussed. *Philadelphia B. & W. R.*

Co. v. Baltimore, 121 Md. 504, 88 Atl. 263.

⁸³ *Kasch v. Akron* (Ohio 1919), 126 N. E. 61, 63; *Ranney v. Cape Girardeau*, 185 Mo. App. 229, 170 S. W. 342.

Plans and specifications are required to validate tax bills. *Monnett v. Fowler*, 184 Mo. App. 615, 170 S. W. 684.

⁸⁴ Action of council resulting in adoption of plans. *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809.

Where the ordinance providing for the improvement contains complete plans and specification, failure of the street commissioner to file same is not material. "No other were needed." *Mound City v. Melvin* (Mo. App.), 205 S. W. 254, 258, following *Platte City v. Paxton*, 141 Mo. App. 175, 181, 182, 124 S. W. 531.

⁸⁵ In the absence of charter or ordinance requirement, the fact that the specifications for a district sewer were not prepared and filed prior to the enactment of the ordinance providing for its establishment and construction does not render the tax bills issued for the work void. *Waddell Inv. Co. v. Hall*, 255 Mo. 675, 680, 164 S. W. 541.

⁸⁶ *Gratz v. Kirkwood*, 182 Mo. App. 581, 597, 166 S. W. 319.

§ 1873. Change of plans.⁸⁷

Slight changes in plans which are not of a substantial character,⁸⁸ or which do not work a fraud on the public or give an advantage to the contractor or injure the value or appearance of the property,⁸⁹ or which do not

Sufficiency. *Wills v. Burbank*, 182 Mo. App. 68, 167 S. W. 608; *Boonville v. Stephens*, 238 Mo. 339, 353, 354, 141 S. W. 1111, holding that plans should be so construed as to sustain their validity, if possible.

Diagram of the proposed improvement filed pursuant to resolution, to be read with resolution. *Wilce v. Cheney*, 93 Wash. 422, 161 Pac. 72.

Laws require specifications to set forth with sufficient detail the nature of the work to be done and of the material to be furnished. *People ex rel. v. Lennon*, 132 N. Y. S. 620, 147 App. Div. 537.

"The specifications must be made sufficiently definite and certain that all may know what each is bidding upon, and that any bidder who secures the contract may be compelled to perform it in the way to produce the kind, character and grade of improvement desired and that liability upon his bond will result from his failure to do so." *Seysler v. Mowery*, 29 Idaho 412, 160 Pac. 262, 264, approving *Hannan v. Board of Education*, 25 Okla. 372, 107 Pac. 646, 30 L. R. A. (N. S.) 214.

87 Change authorized in ordinance by council committee either before or after work begun, held void. *Gratz v. Kirkwood*, 182 Mo. App. 581, 597, 166 S. W. 319.

In **Arkansas** an improvement board "has full authority to

change the original plan and to reform the same or make new plans so that the cost of the improvement contemplated will not exceed the statutory limit." *Buxton v. Nashville (Ark.)*, 201 S. W. 512.

88 Shortening one of the ditches, adding laterals in certain places, total length of ditches dug and pipes laid greater than estimate, change in grade of sewer benefiting property owner and lessening amount of contract. *Stover v. Springfield*, 167 Mo. App. 328, 337, 338.

Authorizing the street superintendent to change the proportions of sand and rock in the concrete, etc., held not illegal because "the cost of the work could be materially increased or decreased by the superintendent, thus rendering favoritism or opposition on the part of the superintendent possible, and introducing such uncertainty into the specifications as to compel bidders for the work to name a higher price than they otherwise would, to the detriment of the property owners, paying for the work." The court rejected this reasoning. *Thoits v. Byxbee (Cal. App.)*, 167 Pac. 166.

89 Variation which does not materially change the character, location or cost of the improvement, or work a fraud on the public or give an advantage to the contractor, or injure the value or appearance of the property does not

increase the cost of the work or result in any injury to any one⁹⁰ may be authorized.

§ 1874. Specifications of material.⁹¹

The selection of the material may be within the discretion of the municipal authorities,⁹² or a specified number of the property owners who are required to pay for the improvement in whole or in part,⁹³ and if they fail

nullify the proceedings. *Meyers v. Wood*, 173 Mo. App. 564, 577, 158 S. W. 909; *Trimble v. Stewart*, 168 Mo. App. 176, 153 S. W. 1086.

⁹⁰ *Caldwell v. Mountain Home*, 29 Idaho 13, 156 Pac. 909, 912.

⁹¹ *Miller v. Oelwein*, 155 Iowa 706, 136 N. W. 1045; *Bryant v. Greenwood*, 112 Miss. 718, 73 So. 728.

Should be definite and certain. *Blair v. Glenn*, 187 Mo. App. 392, 395, 172 S. W. 1195.

Unless the kind and character of the improvement with the material to be used are shown by the resolution the engineer's estimate must show the same. In any event it must be so specific as to give the property owners a general idea of the cost of the different elements of the improvement. *Chicago v. Huleatt*, 276 Ill. 466, 114 N. E. 1021.

In macadam work, after specifying "the spaces between stones shall be filled with clean mill tailings," the ordinances added, "or such other material as may be directed by the city engineer or street committee." In the work mill tailings only were used, and no other material was sought to be used. Held, that the tax bills were not thereby invalidated, as it would be presumed that the bids

were based upon mill tailings. *Miner's Bank v. Clark*, 252 Mo. 20, 27-29, 158 S. W. 597.

⁹² Section 1838, ante; § 1838, vol. 4, ante.

Municipal board to determine material. *Chicago v. Huleatt*, 276 Ill. 466, 114 N. E. 1021.

City to name. *Marion v. Pilot Mountain*, 170 N. C. 118, 87 S. E. 53.

New sidewalk may be made of material different from the old. *Abbot v. Milwaukee*, 148 Wis. 22, 134 N. W. 136.

Kind of pavement is with the municipal authorities or the property owners. *Shreveport v. Hester*, 139 La. 495, 71 So. 779.

Although the charter require "stone," "we think that concrete made in accordance with the specifications shown in this record, being composed of gravel, Portland cement, and sand, when laid and dried and hardened become equal in hardness and durability to natural stone, and may properly be classed as stone within the meaning of the original charter amendment." *Vicksburg v. Robinson*, 113 Miss. 687, 74 So. 617, 619.

⁹³ Property owners may petition for particular materials. *Quam v. Ft. Atkinson*, 167 Wis. 219, 167 N. W. 251.

to make a selection within a period designated, the choice falls to the public authorities.⁹⁴

Sometimes several materials may be named in the alternative with separate plans and specifications for each.⁹⁵

b. Ordinance or resolution providing for improvement.

§ 1875. Ordinance, resolution or order.

The formal action required, whether by ordinance,⁹⁶

Property owners may determine the material. *Lanning v. Hastings*, 93 Neb. 665, 141 N. W. 817; *Union Paving Co. v. Schenectady Board of Contract, etc.*, 134 N. Y. S. 740, 74 Misc. Rep. 646.

Property owner usually has authority to name material, especially if the city has not specified the kind. *Carlisle Borough v. Long*, 47 Pa. Super. Ct. 628.

Property owner given right to select within a named time. *State ex rel. v. Board of Public Works (Mo. App.)*, 202 S. W. 263.

Where a majority of the property owners may select within a named time such time must elapse before city can select. *Cushing v. Petrie*, 179 Mo. App. 326, 166 S. W. 848.

⁹⁴ Ordinance prescribed various kinds and the time within which property owners might select the kinds of material, and in event of failure a municipal board should make the selection. In default, board may make the selection. *Barber Asphalt Paving Co. v. Kansas City Hydraulic Press Brick Co.*, 170 Mo. App. 503, 156 S. W. 749.

⁹⁵ Section 1210, ante; § 1210, vol.

3, ante; *Pettigrew v. Sioux Falls*, 35 S. D. 78, 150 N. W. 772.

Section 1204, ante; § 1204, vol. 3, ante.

Patented materials or those owned and controled by one firm or corporation or a single individual may be selected, irrespective of the requirement as to competitive bidding.

May specify patented materials under law exacting competitive bidding. *McEmen v. Coeur D'Alene*, 23 Idaho 746, 132 Pac. 308, 313-316.

A patented pavement may be selected by municipal authorities or property owners, as such action is not against public policy. *Union Paving Co. v. Schenectady Board of Contract, etc.*, 134 N. Y. S. 740, 74 Misc. Rep. 646.

Material owned and controlled by one firm may be specified. *Barber Asphalt Paving Co. v. Kansas City Hydraulic Press Brick Co.*, 170 Mo. App. 503, 156 S. W. 749.

Patented article may be selected. *Meek v. Chillicothe*, 181 Mo. App. 218, 167 S. W. 1139.

⁹⁶ Ordinance. Georgia. *Hall v. Macon*, 147 Ga. 704, 95 S. E. 248. Illinois. *Belleville v. Miller*, 257

resolution,⁹⁷ or order,⁹⁸ will depend upon the character

Ill. 244, 100 N. E. 946; *Des Plaines v. Winkelman*, 270 Ill. 149; 110 N. E. 417; *People v. Champaign*, 164 Ill. App. 289.

Idaho. *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381; *Veatch v. Gibson*, 29 Idaho 609, 160 Pac. 1112.

Kansas. *Dargatz v. Pauley*, 91 Kan. 698, 139 Pac. 419.

Louisiana. *Shreveport v. Riley*, 140 La. 565, 73 So. 681.

Missouri. *Springfield v. Jones*, 180 Mo. App. 311, 165 S. W. 863; *Maret v. Hough* (Mo. App.), 185 S. W. 544; *Albers v. Acme Paving & Crusher Co.*, 196 Mo. App. 265, 194 S. W. 61; *Kansas City v. Woerishoeffer*, 249 Mo. 1, 155 S. W. 779.

Oklahoma. *Muskogee v. Rambo*, 40 Okla. 672, 138 Pac. 567.

Texas. *Marshall v. Elgin* (Tex. Civ. App.), 143 S. W. 670.

Ordinance essential when controlling law so provides, and hence, a resolution is not sufficient. *Jones v. Whitaker*, 33 Okla. 13, 124 Pac. 312.

Ordinance accepting a bid. *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301, 304.

Ordinance for construction of a tunnel. *Mardis v. McCarthy*, 162 Cal. 94, 121 Pac. 389.

Ordinance required to make surface drainage improvements. *Jones v. Caruthersville*, 186 Mo. App. 404, 407, 171 S. W. 639.

Ordinance to authorize the construction of a sidewalk. *Hackett v. Hussels* (N. J. L.), 102 Atl. 527; *Wood v. Hurley*, 29 S. D. 269, 136 N. W. 107.

Ordinance to authorize the

grading of a street. *Hackett v. Hussels* (N. J. L.), 102 Atl. 527.

Ordinance to change grade of street. *Landis v. Marion*, 176 Iowa 240, 157 N. W. 841; *Brown v. Sigourney*, 164 Iowa 184, 145 N. W. 478; *Friel v. New York*, 134 N. Y. S. 1025, 150 App. Div. 317.

Ordinance to establish grade of street. *Hackett v. Hussels* (N. J. L.), 102 Atl. 527; *Ketchum v. Monnett*, 193 Mo. App. 529, 181 S. W. 1064.

Ordinance or resolution to establish grade of street. *Smith v. Courtland*, 103 Kan. 142, 172 Pac. 1027; *Chase v. Kalher*, 28 Cal. App. 561, 153 Pac. 397.

"A valid ordinance is the foundation of any improvement by special assessment and cannot be dispensed with. Unless a valid ordinance is shown there is nothing on which a subsequent proceeding can rest." *Lovington v. Gregory* (Ill. 1919), 122 N. E. 504, 506.

⁹⁷ Resolution of intention. *Mardis v. McCarthy*, 162 Cal. 94, 121 Pac. 389; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308; *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381.

See §§ 1870, 1871, ante; §§ 1870, 1871, vol. 4, ante.

Resolution of necessity of improvement. *Miller v. Oelwein*, 155 Iowa 706, 136 N. W. 1045; *Ricketson v. Milwaukee*, 155 Wis. 327, 144 N. W. 1101; *German Lutheran Church Society v. Mt. Clemens*, 179 Mich. 35, 146 N. W. 287.

Ordinance or resolution is essential to provide for street improvement. *Moundsville v. Yost*, 75 W. Va. 224, 83 S. E. 910.

Resolution. *People v. Waldorf*,

of the improvement contemplated,⁹⁹ the method of payment therefor,¹ and the construction of the applicable local law.²

153 N. Y. S. 1072, 168 App. Div. 473; *Hoffman v. Zallman*, 49 Ind. App. 664, 97 N. E. 1015; *Waukegan v. Wetzel*, 261 Ill. 498, 104 N. E. 184; *Mt. Carmel v. Risley*, 263 Ill. 299, 104 N. E. 1035; *Jones v. Sheldon*, 172 Iowa 406, 154 N. W. 592.

Resolution to pave, when "ordinance" in a section of a law refers to "resolution." *Pittigrew v. Sioux Falls*, 35 S. D. 78, 150 N. W. 772.

Resolution to repair sidewalk. *Abbot v. Milwaukee*, 48 Wis. 22, 134 N. W. 136.

Street improvements may be initiated by resolution. *Miller v. Portland*, 62 Or. 26, 123 Pac. 64.

Resolution to assess cost of sidewalk. *Belmont Land Assn. v. Garfield Borough*, 90 N. J. L. 394, 103 Atl. 682.

Resolution is sufficient to authorize the building of a retaining wall which is a mere incident of a street improvement which has been ordered by ordinance. *Hackett v. Hussels* (N. J. L.), 102 Atl. 527.

Resolution need not be signed by mayor to render it effective. *Fry v. Seely*, 55 Ind. App. 670, 104 N. E. 774.

Resolution required mayor's signature. *Hackett v. Hussels* (N. J. L.), 102 Atl. 527.

Resolution must show proposed cost. *Chicago v. Malleable Iron Co.* (Ill. 1920), 127 N. E. 349.

⁹⁸ Order, equivalent to an ordinance. *Nevins v. Springfield*, 227 Mass. 538, 116 N. E. 881.

⁹⁹ City may lay, relay or repair temporary sidewalk without proceeding by ordinance. *Monroe v. Pearson*, 176 Iowa 283, 157 N. W. 849.

Authorization to construct or reconstruct sidewalks must specify the sidewalks to be improved. *Clark v. Martin*, 182 Iowa 811, 166 N. W. 276.

¹ "It is elementary that an ordinance is the basis of every valid special assessment." *Moline v. Tri-City Ry. Co.*, 262 Ill. 122, 104 N. E. 271.

Ordinance fixing assessment for benefits. *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301, 304.

Ordinance levying special assessment tax for local improvements. *Celaya v. Brownsville* (Tex. Civ. App.), 203 S. W. 153.

Ordinance for assessment for street grading; general ordinance may answer. *Buis v. Hathaway* (Mo. App.), 195 S. W. 1047.

If an owner refuses after notice within a specified time to construct a sidewalk, ordinance required to authorize city to construct. *Kaynor v. District Ct.*, 178 Iowa 1055, 158 N. W. 557.

Sidewalk construction for which tax bills are issued against abutting property must be authorized by ordinance or proceedings equivalent to the enactment of an ordinance. *Monett v. Fowler*, 184 Mo. App. 615, 170 S. W. 684.

² May follow state law, without ordinance. *Thomas v. Petaluma* (Cal. App.), 165 Pac. 1021.

§ 1876. Sufficiency of order for improvement.³

§ 1877. Publication of improvement ordinance or resolution.⁴

In the absence of mode in the applicable law, city may adopt method by ordinance which becomes exclusive. *Lemon v. Shepherd*, 180 Mo. 332, 336, 337, 167 S. W. 1145.

If the applicable law is silent as to the mode of action, usually it may be either by ordinance or resolution. *Mound City v. Mason*, 262 Ill. 392, 104 N. E. 685.

See § 636, ante; § 636, vol. 2, ante.

³ *St. Louis v. Semple (Mo.)*, 199 S. W. 967; *Warren Bros. Co. v. Boyle (Cal. App.)*, 183 Pac. 706.

See §§ 1870, 1871, ante.

Preliminary resolution, sufficiency. *Allen v. Bellingham*, 77 Wash. 469, 137 Pac. 1019; *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S. W. 276.

Declaration of necessity sustained against the contention that it was too vague and uncertain in its terms, in that certain distances and dimensions were not shown where they were supplied by the plans and specifications, which by specific reference were incorporated in the resolution. *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 550, 551, 172 S. W. 436.

Ordinance, vote required to pass. *State ex rel. v. Gill*, 87 Wash. 201, 151 Pac. 498.

Description of improvement essential. *Chicago v. Weber*, 260 Ill. 105, 102 N. E. 1001.

Sewer district; property to be included. *Chicago v. Sullivan Ma-*

chinery Co., 269 Ill. 58, 109 N. E. 696.

Sewer system, with lateral sewers. *Chicago v. Municipal Engineering & Constr. Co. (Ill.)*, 119 N. E. 40.

Resolution, description of material. *Delmar Inv. Co. v. Lewis*, 180 Mo. App. 22, 162 S. W. 675.

Work must be ordered as law prescribes. *Rieser Co. v. New York*, 145 N. Y. S. 1017, 84 Misc. Rep. 69.

Bonds for street improvements; strict observance of law required. *McAndrew v. Dunmore Borough*, 245 Pa. 101, 91 Atl. 237.

Drainage district improvements. *People ex rel. v. Giles*, 268 Ill. 482, 109 N. E. 270.

Ordinance void in part, where valid parts could be separated from void part, sustained. *Gratz v. Kirkwood*, 182 Mo. App. 581, 596, 598, 166 S. W. 319.

⁴ *Rogsdale v. Florence (Ala.)*, 1919, 81 So. 584; *Waukegan v. Lyon*, 253 Ill. 452, 97 N. E. 848; *State ex rel. v. Ellison (Mo.)*, 191 S. W. 49; *Reinert Bros. Constr. Co. v. Tootle*, 200 Mo. App. 284, 206 S. W. 422; *Fellows v. Dorsey*, 171 Mo. App. 289, 299, 157 S. W. 993.

Proof of publication. *Chicago v. Wells*, 274 Ill. 360, 113 N. E. 695.

Should be published in the manner specified in the law. Such manner is mandatory and jurisdictional. Rule applied to an ordinance establishing an improve-

§ 1879. Ordinance for each distinct improvement.⁵

ment district. *McRaven v. Clancy*, 115 Ark. 163, 171 S. W. 88.

Ordinance for the construction of a viaduct. *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543, 545.

Ordinance for an original construction of a street is void unless published in manner prescribed by law. *Maysville v. Davis*, 166 Ky. 555, 179 S. W. 463, 466.

⁵ *Botterell v. Hollipeter*, 135 Ark. 315, 204 S. W. 843; *Weber v. Knepple*, 166 Ky. 228, 179 S. W. 19.

Single improvement cannot be severed. *Hoopeston v. Smith*, 272 Ill. 604, 112 N. E. 266.

Betterments of paving and laying water pipes are different in character and distinct improvements. *Jackson v. Hart (Miss.)*, 78 So. 780.

Under power to open streets city cannot grade, as opening and grading are distinct improvements. *Philadelphia B. & W. R. Co. v. Baltimore*, 131 Md. 368, 102 Atl. 471.

See § 2029, post; § 2029, vol. 5, ante.

"The improvement of each street or part thereof shall be made under a separate proceeding." The fact that along a portion of the part of the street to be improved a fill was necessary did not invalidate the improvement authorized by one ordinance. *Reiff v. Portland*, 71 Or. 421, 141 Pac. 167, rehearing denied, 142 Pac. 827.

Improving a street in which there is a small park and the improvement runs on either side thereof, does not constitute two distinct improvements and require separate proceeding. *Lawrence v.*

Portland, 85 Or. 586, 167 Pac. 587, distinguishing *Oregon Transfer Co. v. Portland*, 47 Or. 1, 81 Pac. 575, 82 Pac. 16.

Where owing to the topography of the district, in order to secure a reasonable and practicable thoroughfare, one continuous highway made up of streets dedicated by different names, only one method is open. *McQueen v. Van Densen*, 189 Mo. App. 492, 496, 497, 176 S. W. 1057.

Ordinance for a sidewalk and vault construction, held single improvement. *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543, 545.

Sewer included in an ordinance for the construction of a sidewalk purely for the purpose of drainage of the sidewalk is not a double improvement. *Staunton v. Bond*, 281 Ill. 568, 118 N. E. 47, 49, approving and following *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895, and *Carbondale v. Walker*, 240 Ill. 18, 88 N. E. 296.

Construction of pumping station and sewage disposal plant in connection with several main and collateral sewers in one proceeding providing for one entire assessment district considered. *Prevo v. Hammond*, 186 Ind. 612, 116 N. E. 584.

Sidewalks on different streets may be included in one ordinance where they are to be of the same material and of the same width. *Wood v. Hurley*, 29 S. D. 269, 136 N. W. 107, 110, 111, distinguishing *Whittaker v. Deadwood*, 23 S. D. 538, 122 N. W. 590, 139 Am. St. Rep. 1076, and approving *Springfield v. Green*, 120 Ill. 269, 11 N.

§ 1881. Recommendation of ordinance by board.⁶

§ 1882. Procedure in passing improvement ordinance.⁷

§ 1883. Description of the improvement.⁸

E. 261, and *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871.

A single ordinance may provide for more than one improvement. The improvements to be made in each tract of land were of the same kind and character and there was no difference in the physical features of the country, or in the soil to be excavated for the laying of the sewer pipes. It does not appear that any injury was done in having the two tracts included in one ordinance. *Dement v. Caldwell*, 22 Idaho 62, 125 Pac. 200.

Whether should be one improvement, or separate improvements. *People ex rel. v. Omen* (Ill. 1919), 124 N. E. 860.

Ordinance including improvement of a number of streets sustained. *Gerlash v. Spokane*, 68 Wash. 589, 124 Pac. 121.

Drain and catch basins as incidents to street improvement. *Wendt v. Tucker* (Ky. 1919), 216 S. W. 61.

⁶*Homewood v. Grannis*, 265 Ill. 135, 106 N. E. 442; *Marion v. Sisney*, 252 Ill. 421, 96 N. E. 860; *American Tobacco Co. v. St. Louis*, 247 Mo. 374, 157 S. W. 502; *Meyer v. Bobb*, 185 Mo. App. 685, 171 S. W. 600.

⁷Must be passed as law prescribes. *Fuller v. Haines*, 224 Mass. 176, 112 N. E. 873; *Chas v. Kalber*, 28 Cal. App. 561, 153 Pac. 397; *Hoopeston v. Smith*, 272 Ill. 604, 112 N. E. 266.

Law required a resolution of confirmation of a sewer assessment to receive a majority vote of the council members present. A vote of three out of six present, of course, is not such majority. *Livesay v. Secaucus Borough* (N. J.), 97 Atl. 950.

⁸*Hoopeston v. Smith*, 272 Ill. 604, 112 N. E. 266; *Staunton v. Bond*, 281 Ill. 568, 118 N. E. 47; *Blair v. Glenn*, 187 Mo. App. 392, 172 S. W. 1195.

Aseptic tanks as part of sewer system; description, held sufficient. *Schueler v. Kirkwood*, 191 Mo. App. 575, 177 S. W. 760.

Ordinance for constructing tunnel. *Mardis v. McCarthy*, 162 Cal. 94, 121 Pac. 389.

Description of land in an assessment ordinance; is sufficient if it could be located by a surveyor. *Klov Dahl v. Springfield*, 81 Or. 168, 158 Pac. 668.

A diagram of the proposed improvement duly filed may be considered with the resolution providing therefor. *Wilce v. Cheney*, 93 Wash. 422, 161 Pac. 72.

"After work has been completed by the public authorities a supplemental ordinance need not give as detailed a description of the completed improvement as is required in the original ordinance." *Geneseo v. Schultz*, 257 Ill. 273, 100 N. E. 926, following *Markley v. Chicago*, 190 Ill. 276, 60 N. E. 512.

Laying of water pipes; descrip-

§ 1884. Same—street improvement ordinance.⁹

The street improvement ordinance must describe in general terms at least the nature, extent and character of the improvement, otherwise the entire proceedings may be void.¹⁰

Many laws in express terms specify this requirement.¹¹

tion of location of hydrants held defective. *Chicago v. Municipal Engineering & Contr. Co.* (Ill. 1920), 127 N. E. 65.

⁹ Illinois. *Rockport v. Armour* (Ill. 1919), 125 N. E. 356; *Ladd v. Chicago, O. & P. Ry. Co.*, 283 Ill. 260, 119 N. E. 276; *Waukegan v. Burnett*, 268 Ill. 448, 109 N. E. 277; *Mt. Carmel v. McClung*, 269 Ill. 450, 109 N. E. 1011; *Pana v. Baldwin*, 265 Ill. 119, 106 N. E. 454; *Decatur v. Barteau*, 260 Ill. 612, 103 N. E. 601; *Muschbaugh v. East Peoria*, 260 Ill. 27, 102 N. E. 1027; *Glencoe v. Uthe*, 253 Ill. 518, 97 N. E. 1057; *Parkridge v. Wisner*, 253 Ill. 360, 97 N. E. 677.

Nebraska. *Carlson v. South Omaha*, 91 Neb. 215, 135 N. W. 1047.

New Jersey. *Hackett v. Hassels* (N. J.), 102 Atl. 527.

Missouri. *Blair v. Glenn*, 187 Mo. App. 392, 395, 172 S. W. 1195; *Probert v. Girard Investment Co.*, 155 Mo. App. 344, 137 S. W. 41.

¹⁰ Ordinance held invalid because of defective description. *Geneseo v. Brown*, 250 Ill. 165, 95 N. E. 172.

Failure to describe properly; construction of sidewalk. *Chicago v. Edens*, 264 Ill. 64, 105 N. E. 730.

¹¹ *East St. Louis v. Vogel*, 276 Ill. 490, 114 N. E. 941.

Sidewalk construction. *Kirksville v. Ferguson*, 262 Mo. 661, 172

S. W. 4; *Huntsville v. Eatherton* (Mo. App.), 182 S. W. 767; *Langstaff v. Durant*, 111 Miss. 790, 72 So. 236; *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543; *People v. Meerts*, 267 Ill. 210, 108 N. E. 57.

Sufficiency of description of grade of sidewalk. *Staunton v. Bond*, 281 Ill. 568, 118 N. E. 47.

Street paving. *Pettigrew v. Sioux Falls*, 35 S. D. 78, 150 N. W. 772; *Chittenden v. Kibler*, 100 Neb. 756, 161 N. W. 272.

Paving ordinance excluding park. *Lincoln v. Chicago & A. R. Co.*, 262 Ill. 11, 104 N. E. 277.

Width of street improvement need not be specifically given. *Chicago v. Weber*, 260 Ill. 105, 102 N. E. 1001.

Macadam work. *Miners' Bank v. Clark*, 252 Mo. 20, 27, 158 S. W. 597.

"Curb and gutter of cement," to be set out in the street beyond the sidewalk, held sufficient description. *Wills v. Burbank*, 182 Mo. App. 68, 73, 167 S. W. 608.

The grade of street may be determined by direct reference to city datum. *Highwood v. Chicago & M. Electric R. Co.*, 268 Ill. 482, 109 N. E. 270.

'The plan and profile may be attached to and made a part of the ordinance, as this has the same effect as though it had been incorporated at length in the body of

§ 1885. Same—sewer construction ordinance.¹²

The ordinance should prescribe the dimensions, material and character of the sewer proposed to be constructed or refer to plans and specifications on file.¹³

§ 1886. Same—description by reference.¹⁴**§ 1887. Same—details unnecessary.¹⁵****§ 1888. Variance between notice or petition or preliminary resolution or estimate and ordinance or order.¹⁶**

the ordinance. *Watseka v. Orebaugh*, 266 Ill. 579, 107 N. E. 887; *Hillsboro v. Grassel*, 249 Ill. 190, 94 N. E. 48.

¹² *State ex rel. v. Robertson*, 262 Mo. 535, 172 S. W. 21; *Washington v. Stumpe* (Mo. App.), 197 S. W. 165; *Bradley v. New York Cent. R. Co.*, 277 Ill. 608, 115 N. E. 640, 644; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

¹³ *Youmans v. Everett*, 173 Mo. App. 671, 672, 157 S. W. 823; *Mullins v. Everett*, 172 Mo. App. 186, 157 S. W. 823.

Fixing dimensions, etc., held mandatory, but may be by reference. *Springfield v. Jones*, 180 Mo. App. 311, 165 S. W. 863.

Description in general terms sustained. *Waddell Inv. Co. v. Hall*, 255 Mo. 675, 164 S. W. 541.

Sewer outlet. *North Chicago v. Cummings*, 266 Ill. 575, 107 N. E. 776.

¹⁴ *Dement v. Caldwell*, 22 Idaho 62, 125 Pac. 200; *Watseka v. Orebaugh*, 266 Ill. 579, 107 N. E. 887; *Youmans v. Everett*, 173 Mo. App. 671, 160 S. W. 274; *Maryville v. Cox*, 181 Mo. App. 254, 167 S. W. 1166; *Parker-Washington Co. v. Clinton*, 155 Mo. App. 382, 137 S.

W. 28; *Springfield v. Jones*, 180 Mo. App. 311, 165 S. W. 863; *Wilce v. Cheney*, 93 Wash. 422, 161 Pac. 72; *Southern Operating Co. v. Chattanooga*, 128 Tenn. 196, 159 S. W. 1091, 1093, citing § 677, vol. 2, ante (*McQuillin, Mun. Ord.*, § 137), and § 1886, vol. 4, ante (*McQuillin, Mun. Ord.*, § 545.).

Resolution of intention may refer to plans, etc., for description. *Richmond Construction Co. v. Growney*, 29 Cal. 427, 155 Pac. 1008.

Ordinance may fix grade of sidewalk by reference to specifications. *Staunton v. Bond*, 281 Ill. 568, 118 N. E. 47.

Ordinance may fix grade of sidewalk by reference to another ordinance. *People v. Meerts*, 267 Ill. 210, 108 N. E. 57.

Reference to plans not on file. *Albers v. Acme Paving & Crusher Co.*, 196 Mo. App. 265, 194 S. W. 61.

¹⁵ Details of work are not required prior to passage of ordinance: sufficient if on file before bidding. *Waddell Investment Co. v. Hall*, 255 Mo. 675, 691, 164 S. W. 541.

¹⁶ Petition called for "cement sidewalk," and ordinance for

§ 1889. Certainty and validity of improvement ordinance.¹⁷

"The foundation of every special assessment must be a valid ordinance, specifically describing the nature, character and locality of the proposed improvement."¹⁸

The general rule requiring ordinances to be precise, definite and certain,¹⁹ is especially applicable to improvement ordinances.²⁰

"concrete walk," held under circumstances in evidence not fatal. Appeal of Ransom, 149 N. Y. S. 1056, 87 Misc. Rep. 1.

Variance between plans for a street improvement and the ordinance creating the district. Cherry v. Bowman, 106 Ark. 39, 152 S. W. 133, 136.

The resolution and ordinance called for a drainage and sanitary sewer, and the specifications called for a sanitary sewer which kind of sewer was in fact constructed. Held, tax bills were valid. Meyers v. Wood, 173 Mo. App. 564, 158 S. W. 909.

Variance between preliminary resolution and ordinance. Fellows v. Dorsey, 171 Mo. App. 289, 300, 301, 157 S. W. 995.

Designed and substantial variance between the resolution and ordinance is fatal. Oak Park v. Chicago & W. T. Ry. Co., 285 Ill. 459, 120 N. E. 761, approving Smith v. Chicago, 214 Ill. 155, 73 N. E. 346.

Width of street improvement was changed, held not fatal. Re Apple, 161 Iowa 314, 142 N. W. 1021.

Substantial variance between the ordinance and the estimate of the cost is fatal. Chicago v. Edens, 261 Ill. 272, 103 N. E. 996.

Substantial variance between the ordinance and the estimate of the cost will defeat the confirmation of the assessment. Marion v. Sisney, 252 Ill. 421, 96 N. E. 860, following Chicago v. Soukup, 245 Ill. 634, 92 N. E. 564.

A substantial variance between the estimate of the costs and the resolution and ordinance for the improvement is fatal. Chicago Heights v. Angus, 267 Ill. 628, 108 N. E. 758.

Variance between the contract, ordinance and resolution; if only slight and no favoritism is shown or competition denied and no harm done it will be disregarded. Wills v. Burbank, 182 Mo. App. 68, 75, 167 S. W. 608.

Variance between estimate and ordinance. Lovington v. Gregory (Ill. 1919), 122 N. E. 504.

¹⁷ Certainty. Decatur v. Barreau, 260 Ill. 612, 103 N. E. 601.

¹⁸ "No valid assessment can be based upon an ordinance which omits from its terms essential features of the proposed improvement." Chicago v. Arnold, 261 Ill. 142, 146, 103 N. E. 587.

¹⁹ Sections 645, 651, vol. 2, ante.

²⁰ Sidewalk construction. Huntsville v. Eatherton (Mo. App.), 182 S. W. 767.

Grade of sidewalk is fixed by es-

And the further general rule that to be enforceable they must be valid is equally applicable.²¹

§ 1890. Improvement ordinances must be reasonable.

"The power of the legislative department of city government is limited. It may not act arbitrarily beyond the scope of reason."²²

Such bodies necessarily have large discretion but they cannot abuse such discretion by wanton, capricious or arbitrary enactments."²³ Improvement ordinances, therefore, are subject to the same test of reasonableness as are other ordinances.²⁴

tablishing a grade for the center of the street. *Bierness v. Missouri Valley*, 162 Iowa 720, 144 N. W. 628, 630; *Gallaher v. Jefferson*, 125 Iowa 324, 101 N. E. 124.

Certainty of paving ordinance sustained. *Waukegan v. Burnett*, 268 Ill. 448, 109 N. E. 277.

Paving ordinance excluding park. *Lincoln v. Chicago & A. R. Co.*, 262 Ill. 11, 104 N. E. 277.

Certainty of ordinance for paving an elevated street. *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543.

Certainty of ordinance for highway extension. *St. Louis v. Semple (Mo.)*, 199 S. W. 967.

Sidewalk to be laid "along and in front of" property described, and stating the number of front feet on a named street, held ordinance sufficiently certain. *Huntsville v. Eatherton (Mo. App.)*, 182 S. W. 767, 769.

Ordinance designed to establish a new street grade which fails to show whether the elevation given is above or below the directrix is ambiguous and without meaning. *McGuire v. Wilson (Mo. App.)*, 187 S. W. 612, 614.

²¹ Validity. *Elder v. Richmond (Ky. 1920)*, 218 S. W. 239.

Delegation of powers to committee is void. *Gratz v. Kirkwood*, 182 Mo. App. 581, 166 S. W. 319, 183 S. W. 1071.

Void by providing in a street improvement ordinance that a council committee might make alterations in the grade, plans or dimensions of the work at any time. *Gratz v. Kirkwood*, 182 Mo. App. 581, 166 S. W. 319, 183 S. W. 1071.

See § 1822, ante; § 1822, vol. 4, ante.

Void parts capable of elimination from valid parts do not affect the latter. *Gratz v. Kirkwood (Mo. App.)*, 183 S. W. 1071.

See § 816, ante; § 816, vol. 2, ante.

²² *Corrigan v. Gage*, 68 Mo. 541; *Plattsburg v. Hagenbush*, 98 Mo. App. 669, 73 S. W. 725.

²³ *Newcombe v. Kramer*, 189 Mo. App. 538, 176 S. W. 1072.

²⁴ An ordinance for paving an elevated street, held reasonable. *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543.

Street improvement ordinance,

§ 1893. Validating void improvement ordinances.

An ordinance that is merely insufficient or defective, which is within the scope of the municipal powers to pass, may be validated, as well as the proceedings taken thereunder, by subsequent appropriate action.²⁵

Where, however, the enactment of the ordinance is clearly *ultra vires*,²⁶ or where the defect therein is juris-

held indefinite in its terms, oppressive and unreasonable. *Chicago v. Arnold*, 261 Ill. 142, 103 N. E. 587.

"An ordinance for a local improvement will not be held void for unreasonableness as to the character of the improvement unless it is clearly shown by the evidence to be arbitrary, unjust and oppressive." *Chicago v. Weber*, 260 Ill. 105, 102 N. E. 1001, 1003, approving *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946, and *Chicago v. Hulbert*, 234 Ill. 321, 84 N. E. 922.

An ordinance requiring the laying of water pipes on an isolated street, in a sparsely populated region, without access to industries or convenient transportation, largely at the expense of vacant property, not in demand and for which no demand will be created by the construction of the improvement until there is a prospect for better facilities for transportation would be unreasonable and oppressive. *Chicago v. Municipal Engineering & Const. Co.* (Ill. 1920), 127 N. E. 65.

²⁵ "In repeated, decisions this court has held that if an ordinance under which an improvement is made is not a nullity, but is merely defective or insufficient, a new assessment can be levied." *Geneseo v. Schultz*, 257 Ill. 273, 100 N. E.

926, relying on *Lincoln v. Harts*, 256 Ill. 253, 99 N. E. 1037.

New assessing ordinance authorized which has the like force as the original. *Norman v. Allen* (Okla.), 147 Pac. 1002.

Petition for the improvement was defective because the number of signatures thereon, were insufficient. Held, the council could proceed with the improvement without a petition upon the requisite vote. *Spokane v. Bidpath*, 74 Wash. 4, 132 Pac. 638.

²⁶ "Where the ordinance under which a sidewalk is constructed is void because beyond the power of the city, village or town, or because unreasonable, unjust or oppressive, it cannot be validated by a subsequent ordinance, and property owners have the same rights in relation to the subsequent tax as the law gives in relation to the first tax." However, an assessment under an ordinance may be validated by a new ordinance where the work has been done in good faith, that is "for work already done under a prior ordinance which is either defective or where the proceedings under it have been of such a nature that a property owner did not have the privilege of constructing the walk, or for some other reason the tax has been annulled or set aside, provided the

dictional, as failure to give notice of the intention to make the improvement (construct a sewer) as required by the law, it cannot be cured by a subsequent resolution of the legislative body authorizing a new assessment to be made.²⁷

§ 1894. Same—curative power of the legislature.

The legislature may legalize assessments levied against property, but cannot by curative act destroy vested rights or change the obligation of contracts.²⁸

§ 1895. Amendment of improvement ordinance.

Laws expressly authorize amendments of street opening proceedings.²⁹

work already done was done in good faith by the city or under contract duly let and executed." *People v. Lawson*, 285 Ill. 382, 120 N. E. 815; *People v. Moore*, 265 Ill. 444, 107 N. E. 121; *People v. Cherry*, 262 Ill. 110, 104 N. E. 209.

²⁷ *Crawford v. Detroit*, 169 Mich. 293, 135 N. W. 314.

²⁸ *Benshoof v. Iowa Falls*, 175 Iowa 30, 156 N. W. 898.

Legislature may by a curative statute, supply any omission or validate any proceeding, however informal, leading up to the levying of an assessment by a municipal corporation for a public improvement. *Kuehl v. Edmonds*, 85 Wash. 307, 148 Pac. 19; *Waldron v. Snohomish*, 41 Wash. 566, 83 Pac. 1106; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364.

See § 1820, n. 63, vol. 4, ante.

General statute that error in the proceedings should not exempt any property from the lien or the

payment of the tax "after the work has been done and accepted" but correction may be made, etc. Held, not to apply to a substantial violation of a mandatory statutory provision. *Mulligan v. McGregor*, 165 Ky. 222, 176 S. W. 1129, 1134.

Where the original proceedings, as in attempting to create an improvement district, were entirely void, a curative statute which provides no means to ascertain whether the property owners who must pay consent to the improvement involved, as the Constitution requires, is void. *Hamilton v. Board of Improvement, etc.*, 123 Ark. 327, 185 S. W. 440.

Under a law requiring a resolution of intention as the first step to create a special improvement district failure to make such resolution cannot be cured by a general curative statute. The defect is jurisdictional. "Certain it is the legislature cannot breathe the breath of life into a dead thing." *Cooper v. Bozeman*, 54 Mont. 277, 169 Pac. 801, 803.

²⁹ Re Nagy Street, New York

An ordinance providing for construction of a sewer, it has been held, may be amended.³⁰

§ 1897. Construction of improvement ordinances.

Improvement ordinances should receive a reasonable construction, as they are presumed to be passed in a spirit of justice and for the welfare of the community. In construction that purpose should be promoted.³¹

"All parts of the ordinance are to be construed together and the whole ordinance must be given a construction, if reasonably possible, which will support it rather than defeat it."³²

IV. CONTRACT.

a. Execution and validity.

§ 1901. Power to make contract.

Full power is generally possessed by municipal corporations to enter into contracts to secure all necessary or desirable public improvements.³³

City, 164 N. Y. S. 537, 99 Misc. Rep. 314.

³⁰ Dement v. Caldwell, 22 Idaho 62, 125 Pac. 200.

³¹ Waddell Inv. Co. v. Hall, 255 Mo. 675, 164 S. W. 541, 543.

Paving ordinance. Highwood v. Chicago & M. Electric R. Co., 268 Ill. 482, 109 N. E. 270.

³² Highwood v. Chicago & M. Electric R. Co., 268 Ill. 482, 109 N. E. 270.

When two constructions are possible, one of which will render the ordinance invalid and the other sustain it, the court will adopt that construction which sustains it. Parkridge v. Wisner, 253 Ill. 360, 97 N. E. 677; Chicago v. Wilshire, 243 Ill. 123, 90 N. E. 245.

Paving ordinance. Highwood v.

Chicago & M. Electric R. Co., 268 Ill. 482, 109 N. E. 270.

Sidewalk ordinance, where it changed grade. Ketchum v. Monett, 193 Mo. App. 529.

"Roadways" in a street improvement ordinance. Chicago v. Weber, 260 Ill. 105, 102 N. E. 1001.

See §§ 810, 871, ante.

³³ Contract cannot be made under law not applicable to the city. Des Moines v. Barber Asphalt Paving Co., 208 Fed. 828.

Power to make relating to terminals vested in special commission. McCutcheon v. Buffalo Terminal Station Commission, 150 N. Y. S. 850, 88 Misc. Rep. 148, affirmed 154 N. Y. S. 711.

Authorized for sidewalk con-

All conditions precedent to the letting of the contract must be observed in substance at least.³⁴

§ 1902. Notice of power to contract.

One contracting with a municipality is charged with knowledge of the city's powers,³⁵ and if a contract goes beyond, he contracts at his peril.³⁶

§ 1903. Contract must be authorized.³⁷

§ 1904. Mode of making contract.³⁸

The method prescribed by the law applicable to enter into a contract should be followed.³⁹

tract. *Abbot v. Milwaukee*, 148 Wis. 22, 134 N. W. 136.

Street paving and repairs. *Rohr v. Crancer*, 101 Kan. 222, 165 Pac. 823.

Sewer construction. *State v. Ely*, 129 Minn. 40, 151 N. W. 545.

Street paving; time of making. *State v. Dahlman*, 100 Neb. 416, 160 N. W. 117.

Street improvements authorized by contract and payment therefor to be made by property owners on the installment plan. *Creekmore v. Ft. Justice & Co.*, 152 Ky. 514, 153 S. W. 738.

³⁴ Failure to make a preliminary estimate of the cost of the improvement prior to letting the contract does not invalidate it unless this is made a condition precedent. *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S. W. 276.

See § 1866, ante.

³⁵ *McGovern v. Boston*, 229 Mass. 394, 118 N. E. 667.

See § 1166, ante; § 1166, vol. 3, ante.

³⁶ *Enid v. Warner-Quinlan As-*

phalt Co. (Okla.), 161 Pac. 1092.

³⁷ Electric fixtures furnished to city where a city building is being remodeled, it has been held, may be sued for as on an implied contract, and this is true although the contract was not formerly authorized. "Although the officers or agents of a municipality ordering and accepting goods for the municipality are not acting within the scope of their authority and are not authorized to enter into a contract binding upon the city, if the property thus acquired is retained by the municipality for municipal uses, and the contract is merely void as distinguished from illegal, a recovery may be had against the city for the fair reasonable value of the property on an implied contract." *Mobile v. Mobile Electric Supply Co.*, 10 Ala. App. 475, 60 So. 440.

See §§ 1164, 1262, vol. 3, ante.

³⁸ Section 1179, ante; § 1179, vol. 3, ante.

³⁹ *Cohen v. Henderson* (Ky. 1918), 207 S. W. 4; *McCormick v. Oklahoma City*, 203 Fed. 921, 122

If such law specifies no mode, and the municipality adopts a mode as to a particular contract or class of contracts that mode becomes exclusive.⁴⁰

§ 1905. Competitive bidding.⁴¹

All mandatory requirements as to the letting of public

C. C. A. 215; *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381; *Venable v. Plummerville*, 130 Ark. 447, 198 S. W. 106; *Deming v. Metropolitan Engineering & Constr. Co.*, 154 Mo. App. 540, 136 S. W. 740; *Schulte v. Currey*, 173 Mo. 578, 158 S. W. 913; *Eyermann v. St. Louis*, 265 Mo. 529, 178 S. W. 98, L. R. A. 1915F, 854.

Awarding a contract for public work is not merely ministerial, but is judicial in its nature involving the exercise of discretion. *Wurde-man v. Columbus*, 100 Neb. 134, 158 N. W. 924.

Resolution accepting bid subject to the entering into a contract is not in itself a contract. Before a contract exists the formality prescribed by law to create it is to be observed. *Jaxtheimer v. Sharpsville Borough*, 238 Pa. 42, 85 Atl. 994.

In the absence of statutory direction to the contrary a municipal corporation may make an improvement through more than one contract. *Manley v. Marshfield*, 88 Or. 482, 172 Pac. 488, 490.

Subordinate officer cannot contract for alterations in building used by his department, except in event of emergency, since the municipality can be bound only by contracts made as law provides. *Rieser Co. v. New York*, 145 N. Y. S. 1017, 84 Misc. Rep. 69.

Prior to the awarding of a con-

tract for an improvement some laws require the consent of a board or commissioners. This requirement is mandatory. *Walker v. North Bergen Township*, 84 N. J. L. 248, 86 Atl. 63.

Certain contracts (subway system) to be approved by board of estimate. *Union Real Estate Co. v. New York*, 170 N. Y. S. 784, 786.

Approval of presiding officer of legislature of the award of a contract is not required. *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

Attestation of resolution of award of contract is not required. *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

To be in writing. *Mullens v. Kansas City*, 268 Mo. 444, 188 S. W. 193.

Must be made as applicable law requires. If so required, it must have on it the certificate of the superintendent of finance, otherwise it cannot take effect. *Lamb v. Erie* (Pa. 1918), 105 Atl. 463.

⁴⁰ If the applicable prescribes no method for letting a sewer contract and the municipality adopts a mode that becomes exclusive as completely as if it had been laid down in express terms by statute. *Lemon v. Sheperd*, 180 Mo. App. 332, 336, 337, 167 S. W. 1145.

⁴¹ Section 1184, et seq., ante; § 1183, et seq., vol. 3, ante.

Colorado. Colorado Springs v.

improvement contracts by competitive bidding must be observed in good faith.⁴²

Coray, 25 Colo. App. 460, 139 Pac. 1031.

Idaho. McEwen v. Coeur D'Alene, 23 Idaho 746, 132 Pac. 308.

Kansas. Pollock v. Kansas City, 87 Kan. 205, 123 Pac. 985.

Montana. Cooper v. Bozeman, 54 Mont. 277, 169 Pac. 801; Missoula Street Ry. Co. v. Missoula, 47 Mont. 85, 130 Pac. 771.

Nebraska. Wright v. Hoctor, 95 Neb. 342, 145 N. W. 704, rehearing denied, 146 N. W. 997.

New York. Kuhn v. Buffalo, 145 N. Y. D. 910, 84 Misc. Rep. 157.

New Jersey. McGovern v. Trenton, 84 N. J. L. 237, 86 Atl. 539.

North Dakota. Wills v. Bis-marek, 36 N. D. 570, 163.

Oregon. Johns v. Pendleton, 66 Or. 182, 133 Pac. 817, 46 L. R. A. (N. S.) 990; Grimes v. Seaside, 87 Or. 256, 170 Pac. 310; Terwilliger Land Company v. Portland, 62 Or. 101, 123 Pac. 57.

Utah. Utah Savings & Trust Co. v. Salt Lake City, 44 Utah 150, 138 Pac. 1165.

Washington. Malette v. Spokane, 77 Wash. 205, 137 Pac. 496, reversing 68 Wash. 578, 123 Pac. 1005.

Competitive bidding not applicable. Hackett v. Hussels (N. J.), 102 Atl. 527.

In the absence of legal requirement contracts need not be let by competitive bidding. Price v. Fargo, 24 N. D. 440, 139 N. W. 1054; Frisbie Co. v. East Cleveland, 98 Ohio 266, 120 N. E. 309.

Contract for repairs with priv-

ilege of making additional contracts, held that supplemental contract required advertising and competitive bidding. Lewis v. Philadelphia, 235 Pa. 260, 84 Atl. 33.

⁴² Youmans v. Everett, 173 Mo. App. 671, 160 S. W. 274.

Defectives in letting, held to invalidate the contract. Mayes v. Adair County (Mo.), 194 S. W. 58.

Omission in invitation for bids to state the method of payment for the work, as required by law, held a mere irregularity. Matthews v. Ellensburg, 73 Wash. 272, 131 Pac. 839.

A contract where competitive bids were invited on a day named awarded prior to such time is void. "A disregard of the time was a fatal illegality. Advertisements for bids are of importance. It is the part of municipal publicity required of municipalities. If the law is not observed the contract awarded is null and void." Minden v. Glass, 132 La. 927, 61 So. 874.

May be let although there is one bidder only. Meyers v. Wood, 173 Mo. App. 564, 158 S. W. 909.

Patented pavement authorized although competitive bidding required in the letting. Rackliffe-Gibson Constr. Co., 170 Mo. App. 69, 156 S. W. 65.

May be let for material owned exclusively by one contractor under requirement of letting by competitive bids. Barber Asphalt Paving Co. v. Kansas City Hydraulic Press Brick Co., 170 Mo. App. 503, 156 S. W. 749.

§ 1906. Contract should be in writing.⁴³

§ 1907. Formal defects and irregularities.⁴⁴

§ 1909. Defects in preliminary proceedings.

Failure to observe in substance mandatory provisions in the initiation of improvement proceedings at the expense of property owners will invalidate the contract therefor.⁴⁵

Work to be done by union labor only, precludes competitive bidding. *Wright v. Hocker*, 95 Neb. 342, 145 N. W. 704, 146 N. W. 997.

If requiring cutting stone within the city precludes free and open competitive bidding as the law requires, an ordinance so provided is to that extent illegal. *Taylor v. Philadelphia*, 261 Pa. 458, 104 Atl. 766.

Although by ordinance, free and open competition was precluded because a minimum wage per day was contained therein, the contract was sustained, since the excess of cost on account thereof could be deducted from the special assessments. *Gerlash v. Spokane*, 68 Wash. 589, 124 Pac. 121.

Separate bids resulting in one contract, held valid. *Aberdeen v. Equitable Surety Co.*, 92 Wash. 440, 159 Pac. 683.

⁴³ *New Castle v. Dingle*, 185 Ind. 626, 114 N. E. 221, 224, citing § 1906, vol. 4, ante.

See §§ 1179, 1181, ante; § 1179, 1181, vol. 3, ante.

⁴⁴ See § 1910, post; § 1907, vol. 4, ante.

See § 1181, ante; § 1181, vol. 3, ante. *New Castle v. Dingle*, 185 Ind. 626, 114 N. E. 221, 224, citing § 1907, vol. 4, ante.

⁴⁵ *Osburn v. Stone*, 170 Cal. 480, 150 Pac. 367; *Colorado Springs v. Coray*, 25 Colo. App. 460, 139 Pac. 1031; *Winnfield v. Collins (La.)*, 78 So. 747.

Insufficient petition of abutting property owners. *John Ritchie & Sons v. Wichita*, 99 Kan. 663, 163 Pac. 176.

A contract is invalid when a condition precedent is not complied with. Failure to specify in the resolution of necessity what adjacent property will be assessed for the improvement, invalidates the contract. *Dunker v. Des Moines*, 156 Iowa 292, 136 N. W. 536.

Failure to make and submit the estimate of costs of a street improvement, as exacted by the law, vitiates the contract and renders assessments therefor void. *Muskegee v. Nicholson (Okl.)*, 171 Pac. 1102.

Building contract failure to file plans. *Ordway v. Newburyport*, 230 Mass. 306, 119 N. E. 863.

Plans and specifications prepared not as provided by law, held immaterial. *Jaxtheimer v. Sharpville Borough*, 238 Pac. 42, 85 Atl. 994.

Contract for construction of water system without submitting question to electors of city. *Mat-*

§ 1910. Validity in general.

These general limitations and conditions apply to a municipal contract for a public improvement: (1) The subject-matter thereof must be included within the ordinance ordering the improvement; (2) it must not surrender or abrogate any public function or duty; (3) it must be let and made in accordance with the method prescribed.⁴⁶ Minor defects, or mere irregularities, especially those relating to form, in improvement contracts will be disregarded.⁴⁷

thews v. Ellensburg, 73 Wash. 272, 131 Pac. 839.

Fatal defect in advertisements for bids. *McKenzie v. Mandan*, 135 N. D. 107, 160 N. W. 852.

Defect in advertisement for bids, in that time was too short, invalidates proceedings. *Williams v. Ettenson*, 178 Mo. App. 178, 170 S. W. 370.

Defect in advertisement for work preceding publication of resolution of necessity; passing on protests; citizen's paving committee cooperating with municipal authorities in selecting material; held no defects. *Will v. Bismarck*, 36 N. D. 570, 163 N. W. 550.

Irregularities in the preliminary proceedings will not justify the city in refusing to pay for work done under direction of city officers which is accepted and used by the city. *John Richie & Sons v. Wichita*, 99 Kan. 663, 163 Pac. 176.

⁴⁶ *Heman Const. Co. v. Lyon* (Mo. 1919), 211 S. W. 68, 70.

Section 1907, vol. 4, ante.

⁴⁷ Time of letting. *Winnfield v. Collins* (La.), 78 So. 747.

Not made within the time prescribed. *Cooper v. Bozeman*, 54 Mont. 277, 169 Pac. 801.

Time of doing the work. *Hugins v. Rackliffe-Gibson Constr. Co.*, 151 Mo. App. 312, 181 S. W. 1199, following *Gist v. Rackliffe-Gibson Constr. Co.* 224 Mo. 369, 123 S. W. 921, and *Cushing v. Richardson*, 143 Mo. App. 608, 128 S. W. 805.

Failure of ordinance to fix time for completion of the work does not render ordinance and tax bills void. *Jones v. Barber Asphalt Paving Co.* 174 Mo. App. 393, 404, 160 S. W. 276, following *Jaicks v. Middlesex Inv. Co.*, 201 Mo. 111, 98 S. W. 759.

Leaving determination of time for beginning the work to the city engineer, held valid against contention it was delegation of legislative power. *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995.

Differences and disputes and estimates to be settled by city engineer in charge, held valid provisions. *Mallory v. Olympia*, 75 Wash. 245, 134 Pac. 914.

The determination of the completion of the work, and the sum of materials put into it may be committed to the city engineer. "It is not contrary to public policy, and if it chose thus to put itself at the mercy, so to speak, of the other contracting party's servant,

The contract, it is true, should be certain and definite in its terms.⁴⁸

Unauthorized⁴⁹ or provisions which may or may not be legal,⁵⁰ are usually carefully scrutinized by the courts; e. g., those excluding alien labor,⁵¹ requiring union labor exclusively,⁵² fixing and regulating hours of labor.⁵³

it had a right to do so. It is analogous to instances where one person agrees to construct a certain piece of work to the satisfaction of the owner. It has been decided many times that in such case the owner must be satisfied, except that he cannot withhold his satisfaction arbitrarily or fraudulently." *Elliott Contracting Co. v. Seattle*, 88 Or. 150, 171 Pac. 760.

Discrepancy between specifications and bid, does not necessarily render a paving contract invalid. *McGovern v. Chicago*, 281 Ill. 264, 118 N. E. 3, affirming 202 Ill. App. 139; *Droppelman v. Seattle*, 97 Wash. 177, 166 Pac. 248.

Acceptance of a private bond instead of one from a surety company as the law specified, held did not invalidate the contract. *Pease v. Payette*, 26 Idaho 793, 147 Pac. 290.

⁴⁸ In soliciting bids and entering into contracts for general repair work of streets, statements of a general character as to conditions will answer if it is not practicable to state them definitely. *Devlin v. Jersey City*, 90 N. J. L. 318, 100 Atl. 208.

⁴⁹ Arbitration agreement in contract, held unauthorized. *San Antonio v. Reed* (Tex. Civ. App.), 192 S. W. 549, 554.

⁵⁰ Provision delegating legislative power, or authorizing changes after the adoption of the plans,

invalidates the contract. *Gratz v. Kirkwood*, 182 Mo. App. 581, 166 S. W. 319.

Bond to indemnify against injury to others exacted of the contractor by the city does not render the contract void. *Savage v. Tampa*, 64 Fla. 109, 59 So. 242, distinguishing *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684, 6 L. R. A. (N. S.) 1026, 120 Am. St. Rep. 170, a case where the city not the contractor, assumed the liability.

Indemnification of city for injuries to third persons resulting from contractor's negligence does not contravene public policy. *Heman Constr. Co. v. St. Louis*, 256, Mo. 332, 165 S. W. 1032, following *Breeden v. Frankford Marine, etc., Ins. Co.*, 220 Mo. 327, 427, 119 S. W. 576.

⁵¹ Alien labor may be excluded from working on public improvements. *People v. Crane*, 214 N. Y. 154, 108 N. E. 427, Ann. Cas. 1915B, 1254, reversing 150 N. Y. S. 933, 165 App. Div. 449.

⁵² Contract let under law requiring work of public improvements to be done by union labor, held void. *Wright v. Hoctor*, 95 Neb. 342, 145 N. W. 704, 146 N. W. 997.

⁵³ Limiting hours of labor. *McFarlane v. Mosier & Summers*, 141 N. Y. S. 143, 79 Misc. Rep. 460.

Limiting hours of labor a day except in emergency. *Malloy v.*

Laws frequently prohibit in express terms the letting of contracts for specified improvements at prices in excess of their estimated costs.⁵⁴

Improvement contracts resulting from fraud are utterly void;⁵⁵ and they may also be void by mutual mistake.⁵⁶

Interest of a municipal officer, especially a member of the legislative body, who participates in the prelimi-

Briareliff Manor, 143 N. Y. S. 599, 158 App. Div. 456.

Contract under law fixing and regulating hours of labor, held valid. *Medina v. Title Guaranty & S. Co.*, 136 N. Y. S. 786, 152 App. Div. 307; *Barber Asphalt Paving Co. v. Bancroft*, 167 Cal. 185, 138 Pac. 742.

⁵⁴*State ex rel. v. Bates*, 235 Mo. 262, 283, 138 S. W. 482; *Gratz v. Kirkwood*, 182 Mo. App. 581, 166 S. W. 319.

Contract void only as to excess. *Atlantic Bitulithic Co. v. Edgewood*, 76 W. Va. 630, 87 S. E. 183.

"The purpose of an estimate is to enable a city acting for the property owners to know how much they are to be taxed for such improvements and also to limit the power of a city within reasonable bounds in the exercise of its power of taxation for such purposes. The city engineer is entrusted with the duty of making such estimates because of his superior knowledge in that line to that of the member of the city council or the board of public works. While the law relating to cities of the second class does not in express terms prohibit a city from contracting for a price not in excess of the estimated costs, and such a contract would not be void for that reason, yet we believe that if any

city should disregard the estimate provided for and contract for street improvements in excess of the estimated cost the contract would be invalid to the extent of such excess. This construction of the law would be fair to both the contractor and taxpaying property owner, as the former would receive all he was entitled to under a lawful contract and the latter would be protected from the mistakes of the short comings of the city authorities." *Probert v. Girard Investment Co.*, 155 Mo. App. 344, 347, 137 S. W. 41.

⁵⁵Contract made by fraudulent combination between the contractor and the municipal authorities is utterly void. *Lewis v. Philadelphia*, 235 Pa. 260, 84 Atl. 33.

Buying off the opposition of an alderman renders contract void; it cannot be ratified by the city, and there can be no recovery thereon. *McMillan v. Barber Asphalt Paving Co.*, 151 Wis. 48, 138 N. W. 94.

⁵⁶Fraud, mutual mistake, and inadequacy in estimate. *Young v. Holyoke*, 225 Mass. 140, 114 N. E. 62.

Contract for construction of a dam and storage reservoir; fraudulent representations; mutual and material errors of fact. *Winston v. Pittsfield*, 221 Mass. 356, 108 N. E. 1038.

nary proceedings, or in the making of the contract, will ordinarily render the contract void.⁵⁷

§ 1911. Provisions affecting the cost of the work.⁵⁸

Provisions requiring the contractor in doing the work to exercise ordinary care to safeguard the public,⁵⁹ making him liable for defects and damages to sidewalks, sewers, water pipes, etc.,⁶⁰ regulating the hours of labor,⁶¹ and requiring the payment of the prevailing wage in the locality⁶² have been sustained against the contention that such provisions increased the cost of the work.

⁵⁷ Disqualification of councilman who voted for proceeding. *Graves v. Griffin-O'Neil & Sons* (Tex. Civ. App.), 189 S. W. 778.

Councilman voted for ordinance providing for contract was interested, held contract void. *Gantenbein v. Pasco* (Wash.), 131 Pac. 461.

See § 513, ante; § 513, vol. 2, ante; § 599, ante; § 599, vol. 2, ante; § 1252, ante; § 1252, vol. 3, ante.

⁵⁸ Provisions as to disposition of waste excavated material at discretion of city officer in charge, as to increasing cost of work, sustained. *Hunt v. Manning*, 24 Cal. App. 44, 140 Pac. 39, 42.

Bid exceeded estimate, but error was discovered and the contract amount was within the limit, held valid. *Hadlock v. Tucker*, 93 Neb. 510, 141 N. W. 192.

⁵⁹ Mere requirement that contractor should execute a bond to run three years, with provision that the contractor should exercise ordinary care to safeguard the public, held not to render contract void on ground of increasing cost of work. *Locke v. Cowan* (Cal. App.), 168 Pac. 387.

A stipulation in a contract for the construction of a sewer to indemnify the city against all suits brought on account of injuries sustained by any person by reason of any act of the contractor or its agents "in doing the work * * * or by or an account of any act or omission of the contractor, its servants or agents, is valid * * * not opposed to public policy. *Heman Construction Co. v. St. Louis*, 256 Mo. 332, 337, 165 S. W. 1032; *Breeden v. Frankford Marine, etc., Ins. Co.*, 220 Mo. 327, 427, 119 S. W. 576.

⁶⁰ The contractor was so bound under the law without such provision. *Pease v. Payette*, 26 Idaho 793, 147 Pac. 290.

⁶¹ *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819; *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005.

⁶² Hours of labor and prevailing rate of wage in locality. *Ewen v. Thompson-Starett Co.*, 208 N. Y. 245, 101 N. E. 894, affirming 135 N. Y. S. 1110, 151 App. Div. 923.

Requiring contractor to pay stated price to unskilled labor, being the current wage in the local-

§ 1912. Same—guaranty of work and stipulations for repair.⁶³

Municipal charters and statutes authorize the inclusion in an ordinance for the construction of a street pavement a provision that the work and material must be guaranteed and kept in repair by the contractor doing

ity, held valid. *Norris v. Lawton* (Okl.), 148 Pac. 123.

Fixing a minimum wage rate for common labor on public improvement work, and limiting hours, held valid, although the rate was higher than the prevailing rate in the locality. *Malette v. Spokane*, 77 Wash. 205, 137 Pac. 496, reversing 68 Wash. 578, 123 Pac. 1005.

⁶³ *Arkansas. English v. Shelby*, 116 Ark. 212, 172 S. W. 817; *McClendon v. State*, 129 Ark. 286, 195 S. W. 686.

Florida. Manley-Stearns Const. Co. v. Miami (Fla.), 75 So. 27.

Illinois. Conway Co. v. Chicago, 274 Ill. 369, 113 N. E. 703, reversing 195 Ill. App. 313.

Indiana. Barber Asphalt Pav. Co. v. Indianapolis, 52 Ind. App. 587, 101 N. E. 31.

Michigan. Newberry v. Detroit, 184 Mich. 188, 150 N. W. 838, 840.

Minnesota. Steele v. Duluth, 136 Minn. 288, 161 N. W. 593.

Missouri. Collins v. A. Jaicks Co. (Mo. 1919), 214 S. W. 391.

New York. Cameron-Hawn Realty Co. v. Albany, 207 N. Y. 377, 101 N. E. 162, reversing 131 N. Y. S. 1107, 146 App. Div. 896; *Uvalde Contracting Co. v. Mathewson*, 219 N. Y. 286, 114 N. E. 388, reversing 158 N. Y. S. 1133; *Asphalt Paving & Contr. Co. v. New York*, 134 N. Y. S. 433, 149 App.

Div. 622; *New York v. Continental Asphalt P. Co.*, 148 N. Y. S. 436, 163 App. Div. 486; *Seneca Falls v. Botsch*, 149 N. Y. S. 320, 86 Misc. Rep. 481.

Virginia. Davis v. Newport News, 120 Va. 290, 91 S. E. 136.

United States. American Bonding Co. v. Alcatraz Const. Co., 202 Fed. 483; *Barber Asphalt Pav. Co. v. St. Paul*, 224 Fed. 842, 138 C. C. A. 558; *Hutchinson v. Kansas Bitulithic Co.*, 239 Fed. 659, 152 C. C. A. 493.

Time specified begins to run from acceptance. *New York v. Interstate Pav. Co.*, 136 N. Y. S. 195, 151 App. Div. 714.

Guarantee pavement would endure ten years, valid. Means contractor would keep it in repair during period. *Barber Asphalt Paving Co. v. Kansas City Hydraulic P. B. Co.*, 170 Mo. App. 503, 156 S. W. 749.

Guaranty of repair work on construction of sewer under water. *McGovern v. Salem*, 214 Mass. 358, 101 N. E. 974.

"The provision requiring the road to be maintained for ten years is not improper. It is meant to secure a road that will last ten years. It is not a case of ordinary maintenance or 'repair' within the meaning of the statute." *Mueller v. Hudson County Boulevard Comrs.*, 87 N. J. L. 702, 94 Atl. 84.

the work for a term of years to be specified in the ordinance or contract.⁶⁴ Under such provision, it has been held, the city has no power to contract to bind itself to employ the same contractor to make all repairs which may, during a term of years succeeding the completion of street paving work, become necessary from causes having no connection with the sufficiency, character or durability of the completed work, and to pay therefor the same price per unit which by the terms of the contract was to be paid in special tax bills for the construction.⁶⁵

⁶⁴ *Gillfillan v. Bartlesville* (Okl.), 148 Pac. 1012; *Phillips v. Barthesville* (Okla.), 148 Pac. 1016; *Rohr v. Crancer*, 101 Kan. 222, 165 Pac. 823.

"Municipal officers who in contracting for such public work, should neglect to take from a contractor some kind of a guarantee of the perfection of the work and materials, would be derelict in their duty and unfitted for the trust with which they had been invested. The kind of guaranty should be left to their discretion and business sense. We think no wiser or more adequate provision for securing perfection in the completed work could be devised than that of requiring the contractor to maintain it for a reasonable time at such cost as would compensate for the repair necessary to preserve good work and good material from becoming imperfect from natural and unavoidable causes." *Seaboard National Bank v. Woesten*, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279. On this case a later Missouri decision comments as follows: "This seems to have been practically the last word of

this court upon the question, and marks the boundary, on lines most liberal to the authority of the city, of its charter power to make contracts for the future maintenance of its streets for the purpose of securing good work and the use of good material in their construction. It has been followed in *Barber Asphalt Pav. Co. v. Hezel*, 155 Mo. 391, 56 S. W. 449; *Barber Asphalt Pav. Co. v. French*, 158 Mo. 534, 58 S. W. 934; *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062; *Bank v. Woesten*, 176 Mo. 49, 75 S. W. 464; *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926." *Eyermann v. St. Louis*, 265 Mo. 529, 542, 178 S. W. 98, L. R. A. 1915F, 854.

⁶⁵ "This is the first case that has come to this court in which the attempt has been made to hold the city to the performance of a contract of this character. In the cases cited it has been urged that these charter provisions should receive an interpretation favoring the exercise by the municipal legislature of the broadest powers in the performance of its duties with respect to the construction and

§ 1913. One contract for several improvements.⁶⁶**§ 1915. Unauthorized and void contracts.⁶⁷****§ 1916. Estoppel.⁶⁸**

No estoppel should be adjudged against the officers of a municipal corporation without clear and unmistak-

maintenance of its streets, and extreme restiveness has sometimes been indicated under the limitations which the people have seen fit to impose through legislative enactment or constitutional charter; but the defendant city is now here strenuously asking the protection of its charter against its own attempted action with a case which strongly illustrates the wisdom of these limitations. We have no choice but to extend it, and must hold the contract is void with respect to the provision invoked in this suit as being against the plain provisions of this charter." *Eyer-
mann v. St. Louis*, 265 Mo. 529, 542, 178 S. W. 98, L. R. A. 1915F, 854.

⁶⁶ *Wagoner v. LaGrande*, 89 Or. 192, 173 Pac. 305.

⁶⁷ No recovery on void contract. *McGovern v. Boston*, 229 Mass. 394, 118 N. E. 667; *Missoula Street Ry. Co. v. Missoula*, 47 Mont. 85, 130 Pac. 771; *Ward v. Kropf*, 207 N. Y. 467, 101 N. E. 469, affirming 127 N. Y. S. 1148, 143 App. Div. 919.

Void contract, burden of proof. *Malloy v. Briarcliff Manor*, 143 N. Y. S. 599, 158 App. Div. 456.

⁶⁸ *New Castle v. Dingle*, 185 Ind. 626, 114 N. E. 221, 224, citing § 1916, vol. 4, ante.

The city accepting the benefit of work done at its request in ex-

tending its water work system, held estopped to deny validity of the contract for such work. *Holmes v. Chicago*, 203 Ill. App. 445, 448.

Where the city officers make a finding that a petition of abutting property owner to pave a street is legally sufficient and they proceed with the improvement the contractor is entitled to rely on that finding and make a contract with the city and proceed with his undertaking. In such case the city is estopped to deny the validity of the contract or its liability to the contractor for the pavement. *John Ritchie & Sons v. Wichita*, 99 Kan. 663, 163 Pac. 176, following *Sleeper v. Bullen*, 6 Kan. 300, 307.

A city is not estopped from questioning the sufficiency of the work for the reason that its inspector and city engineer were on the ground, saw the manner in which the work was being performed and permitted it to go on, where by the contract the city reserved not only the right to inspect the work while it was in progress but the right to make claim for any defective work within two years after the contract work should be completed. The purpose of this was to protect the city against any incompetence or negligence on the part of its inspector. The contractor engaged in the work knowing that his failure to perform the work properly

able proof of acts of ratification and acquiescence, performed within the scope of their powers and duties.⁶⁹

§ 1918. Contract must conform to law, ordinance or order authorizing the improvement.⁷⁰

§ 1920. Ratification of contract.⁷¹

would not be excused because of the failure of the inspectors to see that it was performed according to the stipulations. There can therefore be no estoppel within the time limited from the fact that the work of inspection was indifferently performed. *Baumgartner v. Renton*, 96 Wash. 588, 165 Pac. 484.

⁶⁹ *Watts v. Levee District*, 164 Mo. App. 263, 282 et seq., 145 S. W. 129, considering estoppel against officers of a levee district.

Of municipal corporation, held no basis for, as no consent appeared. *Board of Public Improvement Comrs. v. Galbraith*, 123 Ark. 619, 185 S. W. 474.

⁷⁰ *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381; *Warner v. Ashland*, 154 Wis. 54, 142 N. W. 513; *Boonville v. Stephens*, 238 Mo. 339, 141 S. W. 1111; *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S. W. 276; *McHugh v. Tacoma*, 76 Wash. 127, 135 Pac. 1011.

⁷¹ *New Castle v. Dingle*, 185 Ind. 626, 114 N. E. 221, 224, citing § 1920, vol. 4, ante.

Authorized. *Eisenschmidt v. Ader* (Ky. 1919), 215 S. W. 48.

Contract for purchase of paving material. *Warren Bros. Co. v. Boyle* (Cal. App.), 183 Pac. 706.

May ratify if acts are within the scope of the corporate powers,

but to do so some affirmative act must be taken. Inaction will not answer. *American Hardwood Lumber Co. v. Benton*, 132 Ark. 41, 200 S. W. 276.

A contract inherently illegal cannot be ratified, e. g., where a contractor bought off the opposition of an alderman. "The relation of principal and agent did not exist between the erring alderman and the city. A municipal corporation cannot condone in this way illegalities of this nature." *McMillan v. Barber Asphalt Paving Co.*, 151 Wis. 48, 138 N. W. 94, 96.

Ratification of sewer construction contract precludes objections thereto. *First Nat. Bk. of Emmetsburg*, 157 Iowa 555, 138 N. W. 451.

Municipal officers have authority to consent to change in work, notwithstanding previous consent to change as provided by the contract had not been given. *Alsmeier v. Adams* (Ind. App.), 105 N. E. 1033.

Mere knowledge by conversation of members of the council that the mayor had contracted with the plaintiff for street work and such work was being done, held not a ratification. *Venable v. Plummerville*, 130 Ark. 447, 198 S. W. 106.

§ 1921. Modification.⁷²

"It is a general principle of municipal law that a municipal corporation having the power to make a contract can deal with the contract in the same manner as if it were a natural person, and may in the absence of statutory limitation, change or modify it or cancel it in the same manner as it might originally contract, if modified by the municipal officers of the municipality having

⁷² *Re Mayden*, 156 Iowa 157, 135 N. W. 571; *Baltimore v. Clark*, 128 Md. 291, 97 Atl. 911; *Callan v. Peck*, 37 R. I. 227, 91 Atl. 34.

Must be authorized. *Bunting Bull Co. v. Mt. Vernon*, 217 N. Y. 510, 112 N. E. 442, affirming 147 N. Y. S. 1101, 163 App. Div. 856.

City reserved right to make changes, etc. *Geary v. New Orleans Board of Comrs.*, 139 La. 781, 72 So. 245.

Reasonable changes only. *McHugh v. Tacoma*, 76 Wash. 127, 135 Pac. 1011.

After a valid contract is made the city cannot by another contract release the first contractor from performance. *McIntyre v. Los Angeles*, 23 Cal. App. 681, 139 Pac. 240.

Rescinding of contract sustained where contractor bid on wrong plans due to negligence of the city engineer. *Joseph Balaban Co. v. New York*, 149 N. Y. S. 954, 87 Misc. Rep. 312.

Right to abrogate by a later contract denied, where latter was unauthorized. *Graves v. M. Griffin O'Neill & Sons (Tex. Civ. App.)*, 189 S. W. 778.

By agreement, sustained. *Board of Improvement Comrs. v. Galbraith*, 123 Ark. 619, 185 S. W. 474, 477.

Amendment supplying omission as to computation to conform to the real agreement, sustained. *Valcanite Paving Co. v. Philadelphia*, 252 Pa. 605, 87 Atl. 930, distinguishing *Lewis v. Philadelphia*, 235 Pa. 260, 84 Atl. 33, and *Smith v. Philadelphia*, 227 Pa. 423, 76 Atl. 221.

Modification only as provided for in the contract. *McHugh v. Tacoma*, 76 Wash. 127, 135 Pac. 1011; *MacArthur Bros. Co. v. New York*, 164 N. Y. S. 753, 177 App. Div. 725.

Additional work. *R. G. Packard Co. v. New York*, 137 N. Y. S. 9, 151 App. Div. 941.

Extra work, regrading. *Uvalde Asphalt Paving Co. v. New York*, 138 N. Y. S. 1029, 154 App. Div. 112.

Extra work due to change. *Brobst v. Reading*, 236 Pa. 627, 85 Atl. 31.

Modification as to cost authorized. *McGillivray v. Bremerton*, 90 Wash. 605, 97 Atl. 930.

Changes, to lessen cost of work. *Stover v. Springfield*, 167 Mo. App. 328, 152 S. W. 122.

Substitution of different material. *Brobst v. Reading*, 236 Pa. 627, 85 Atl. 31.

Change in material of sidewalk.

authority to act in this respect.”⁷³ “Such modification, it is safe to assume, may be lawfully made when required by an exigency to meet a situation in the nature and progress of the work that was neither understood nor contemplated when the contract was made.”⁷⁴

As a broad proposition, the power of a municipality to modify a public improvement contract is lodged in the body or officer authorized to make the contract.⁷⁵

§ 1922. Assignment.⁷⁶

§ 1923. Construction.

The judicial judgments show plainly that public improvement contracts are construed with respect to their

Stott v. Salt Lake City, 47 Utah 113, 151 Pac. 988.

As to use of large size of stone, at discretion of city engineer and accepted. Burton v. Ruthland, 87 Vt. 224, 88 Atl. 729.

Ordering aqueduct made wider, binds city to pay therefor. Barker v. New York, 242 Fed. 350, 155 C. C. A. 126.

Modification as to manner of payment to contractor denied. Meacham Contracting Co. v. Hopkinsville, 164 Ky. 703, 176 S. W. 187.

Modification as to payment by course of business denied. New York v. Third National Bank, 221 Fed. 175, 137 C. C. A. 75.

Whether modified, question of fact. Carson v. Dawson, 129 Minn. 543, 152 N. W. 842.

⁷³ Atlantic City v. Warren Bros. Co., 226 Fed. 372, 382, 141 C. C. A. 202.

⁷⁴ Atlantic City v. Warren Bros. Co., 226 Fed. 372, 382, 141 C. C. A. 202, quoting from Randolph v. Post, 93 U. S. 502, 23 L. ed. 957.

⁷⁵ Atlantic City v. Warren Bros. Co., 226 Fed. 372, 382, 141 C. C. A. 202, quoting with approval from § 1921, p. 4138, vol. 4, ante.

Modification to be approved by council. Maysville v. Davis, 166 Ky. 555, 179 S. W. 463.

⁷⁶ California. Stanwood v. Carson, 169 Cal. 640, 147 Pac. 562; Hoare v. Glann (Cal. App.), 175 Pac. 701; Los Angeles Stone Co. v. National Surety Co., 178 Cal. 247, 173 Pac. 79.

Indiana. State v. Aubry (Ind. App. 1919), 124 N. E. 709.

Kentucky. Louisville Comrs. v. Gates, 159 Ky. 391, 167 S. W. 417.

Oklahoma. Chas. T. Derr Const. Co. v. Gelruth, 29 Okl. 538, 120 Pac. 253.

S. Carolina. Spear v. Gaffney Board of Public Works, 99 S. C. 144, 82 S. E. 1010.

Washington. Waldy v. Seattle, 93 Wash. 407, 161 Pac. 65.

Money to accrue from performance of the contract to pay materialmen may be assigned. Federal

subject-matter and the language employed to express their purposes in like manner as are other written instruments, the object being in each instance, of course, to ascertain the real intention of the parties. Few general rules may be drawn from the decisions. The subject-matter, the terms used to state the agreement, the circumstances of each case, and the practical end sought should be kept in mind.⁷⁷

Heating Co. v. Buffalo, 163 N. Y. S. 336, 99 Misc. Rep. 121.

Filing of assignment with officer is not always required to validate it. *Re Interstate Paving Co.*, 197 Fed. 371.

Assignment gives right to recover sum due against all who have not prior claim. *Independent School Dist. v. Hall*, 159 Iowa 607, 140 N. W. 855.

Bond to secure laborers and materialmen inures to the benefit of assignee of contractor. *Hub Hardware Co. v. Aetna Accident and Liability Co.* (Cal.), 173 Cal. 81.

Claim of assignee who advanced money to complete the work, takes precedence over subsequently filed liens of materialmen. *C. T. Willard Co. v. New York*, 142 N. Y. S. 11, 81 Misc. Rep. 48.

Contractor completing work after assignee had abandoned it; material appropriated by contractor of assignee left on street, rendered him liable therefor to assignee. *Hoare v. Glann* (Cal.), 168 Pac. 346.

Assignment on condition that assignee would first pay materialmen, and subcontractors and take balance, held right of assignee was based on the condition. *Wilson v. First National Bank*, 17 Cal. App. 390, 119 Pac. 957.

Amounts due under assignment made prior to liens for labor and material, held superior. *New York v. Third National Bank*, 221 Fed. 175, 137 C. C. A. 75.

Allowed on acceptance by the city. Subject to all defenses against contractor. *State v. Indianapolis* (Ind. 1919), 123 N. E. 405.

Under laws of Washington, an assignment by contract of city warrants to a bank that advanced money to pay for work and material, that went into the improvement, gives the bank a superior equity to that the contract's surety. *American Surety Co. v. Bellingham National Bank*, 254 Fed. 54.

See § 1858, post; § 1958, vol 4, ante.

⁷⁷Provisions in sewer contract to indemnify the city against actions for injuries due to contractor's negligence. *Heman Constr. Co. v. St. Louis*, 256 Mo. 332, 165 S. W. 1032.

The contractor does not warrant the sufficiency of plans of street grading in the absence of stipulation in the contract to that effect. In such case the warranty is made by the city. *Aberdeen Constr. Co. v. Aberdeen*, 84 Wash. 429, 147 Pac. 214.

An improvement contract, therefore, is to be construed

Contract as to repairs, when and where directed. *Uvalde Contracting Co. v. New York*, 145 N. Y. S. 604, 160 App. Div. 284.

Provision as to correcting imperfect or defective work in building a trunk sewer. *McGovern v. Salem*, 214 Mass. 358, 101 N. E. 974.

Sewer construction. *Baltimore v. Clark*, 129 Md. 291, 97 Atl. 911; *Heman Constr. Co. v. St. Louis*, 256 Mo. 332, 165 S. W. 1032.

Sewer construction to be paid for by the cubic yard, determination to be made by city engineer. *Baltimore v. M. A. Talbott & Co.*, 120 Md. 354, 87 Atl. 941.

Paving; crushed stone "thoroughly rolled and compact." *Ford v. Cedar Rapids (Ia.)*, 168 N. W. 870.

Street paving; quantity of work contractor was to secure to do. *Burke v. Board of Improvement, etc.*, 120 Ark. 435, 179 S. W. 654, 657.

Street grading, "embankment in excess of excavation," and "earth filling furnished" as used interchangeably, as determining compensation of contractor. *Mechanics' Bank v. New York*, 212 N. Y. 145, 105 N. E. 971, reversing 135 N. Y. S. 978, 151 App. Div. 87.

Excavation. "Surplus earth," including top soil, belonged after it was excavated and ready for removal to the contractor, under particular contract. *Long Island Contracting & S. Co. v. New York*, 204 N. Y. 73, 97 N. E. 483, reversing 120 N. Y. S. 894, 136 App. 915.

Excavation of bulkhead line. *R.*

G. Packard Co. v. New York, 137 N. Y. S. 9, 151 App. Div. 941.

Regulating curbing and repairing, held not to cover substantial excavating. *Uvalde Asphalt Paving Co.*, 138 N. Y. S. 1029, 154 App. Div. 112.

Lining a reservoir. *International Contract Co. v. Seattle*, 70 Wash. 504, 127 Pac. 115.

Contract to drill and equip well for a town. *Dickerson v. Eldorado (Okl.)*, 166 Pac. 708.

Removal of snow; "actually removed," "inside measurements," as to payment of contractor. *Shaughnessy v. New York*, 150 N. Y. S. 805, 165 App. Div. 444.

Contract to lay sewer pipes, limited by bid. *Reilly v. Wilkes-Barre*, 258 Pa. 202, 101 Atl. 954.

Repair conduit contract, held not to include damages due to city's negligence. *Moran v. Salt Lake City (Utah)*, 175 Pac. 701.

Aqueduct construction contract as involving right to recover payment for concrete masonry, which had been fixed by an arbitrary line. *Barker v. New York*, 242 Fed. 350, 155 C. C. A. 126.

Contract for extension and improvement of a water works system. *Pitt Construction Co. v. Dayton*, 237 Fed. 305.

Where measurement lines are changed by city engineer, new lines control. *Barker v. New York*, 242 Fed. 350, 155 C. C. A. 126.

Test of pipe guaranteed to stand city test and to be satisfactory to named city officer. *St. Louis v. Parker-Washington Co.*, 271 Mo. 229, 196 S. W. 767.

Paving contract requiring the

according to the ordinary and usual import of the language in which it is expressed.⁷⁸

The words and terms employed therein are to be given their usual meaning.⁷⁹

The provision of the contract must be construed as a whole.⁸⁰

city to pay cash for work in front of all "unassessable" property and give assessment bills for the work done in front of assessable property, held to mean that "the city must pay the contractor the amount of all assessment bills handed to him whenever it developed that the paving covered by such bills abut on unassessable property, even though the bill apparently had been accepted as payment." *Vulcanite Paving Co. v. Philadelphia*, 252 Pa. 605, 97 Atl. 930.

Street maintenance contract. *English v. Shelby*, 116 Ark 212, 172 S. W. 817; *Manley-Stearns Const. Co. v. Miami (Fla.)*, 75 So. 27.

Paving contract guaranty for five years, held defects arising from imperfect doing of work were only included. *New York v. Brooklyn Alcatraz Asphalt Co.*, 147 N. Y. S. 840, 84 Misc. Rep. 572.

Paving ten year maintenance contract requiring repairs necessary from natural causes, ordinary wear, etc, does not include defects caused by tunneling or tearing up by other contractors. *Troy v. Fidelity & Deposit Co.*, 167 N. Y. S. 338, 180 App. Div. 41.

⁷⁸ *Heman Constr. Co. v. St. Louis*, 256 Mo. 332, 165 S. W. 1032.

⁷⁹ "Bonds." *Jennings v. Paseo*, 82 Wash. 335, 144 Pac. 37.

Pier as an "appurtenance," in sewer construction contract. *Baltimore v. M. A. Talbott & Co.*, 120 Md. 354, 87 Atl. 941, 945.

"Travel," as employed in a statute, in prescribing that in the construction of a sewer the work should not unnecessarily interfere with travel, held to embrace travel by street car. *Public Service Ry. Co. v. Frazer*, 89 N. J. Eq. 569, 105 Atl. 387.

Repairs; to keep street in repair for one year after the completion of the paving. *Hutchinson v. Kansas Bitulithic Co.*, 239 Fed. 659, 155 C. C. A. 493.

Repairs of injury to water or gas pipes in the construction of sewers by a contractor, held limited to acts of contractor, as distinguished from defective condition of pipes. *Baltimore v. M. A. Talbott & Co.*, 120 Md. 354, 87 Atl. 941, 946, 947.

"Unassessable property," in a paving contract wherein a city agreed to pay for work in front of such property. Property abutting on property already paved, held such property. *Vulcanite Paving Co. v. Philadelphia*, 252 Pa. 600, 97 Atl. 928, 252 Pa. 605, 97 Atl. 930.

⁸⁰ "The true doctrine is that all the contract must be taken together as the standard the parties have devised for the control of their relations to each other." *El-*

If possible a contract must be so interpreted as to give effect to all of its provisions. The construction of an agreement which gives effect to the manifest intention of the parties and is not clearly at variance with the language of the whole instrument should be adopted. "The purpose in construing all contracts is to ascertain the intention of the parties, and when that is done by a general survey of the whole writing, such intention cannot be defeated by the language in any one part of the instrument which, standing alone, would lead to a contrary or different conclusion."⁸¹

The meaning of doubtful or ambiguous phrases or terms is often a question of fact,⁸² and in such case sometimes the construction adopted by the parties themselves will control,⁸³ and sometimes the decision of the municipal officer in charge of the work in event of legitimate dispute is made final by the contract.⁸⁴

Like the ordinance providing for the improvement, the contract is to be so construed as to sustain its validity when the language will permit.⁸⁵

§ 1924. Forfeiture and restoration.⁸⁶

Liott Contracting Co. v. Portland, 88 Or. 150, 171 Pac. 760, 762.

⁸¹ *Vulcanite Paving Co. v. Philadelphia*, 239 Pa. 524, 86 Atl. 1086.

⁸² *Douglass & Varnum v. Morrisville*, 89 Vt. 393, 95 Atl. 810; *Kieburz v. Seattle*, 84 Wash. 196, 146 Pac. 400, 404.

⁸³ *Katz-Craig Contracting Co. v. Cozad*, 101 Neb. 189, 162 N. W. 490.

⁸⁴ City engineer to determine all questions, etc. *Baltimore v. M. A. Talbott & Co.*, 120 Md. 354, 87 Atl. 941.

Where the meaning is susceptible of two constructions, that given to it by the city engineer is controlling under a contract making

his construction final in event of a legitimate dispute. *Jennings v. Pasco*, 82 Wash. 335, 144 Pac. 37.

Although the city engineer in charge has power to approve of all materials and all of his orders are to be obeyed, as the contract provided, subject to specifications, this does not preclude judicial investigation, since the engineer is not made a sole arbitrator. *Algate v. Lansing*, 180 Mich. 484, 147 N. W. 561.

⁸⁵ *Boonville v. Stephens*, 238 Mo. 339, 141 S. W. 1111.

⁸⁶ *New York v. Third National Bank*, 221 Fed. 175, 137 C. C. A. 75; *Ireland v. Portland (Or. 1919)*, 179 Pac. 286.

b. Performance.

§ 1925. Substantial performance sufficient.⁸⁷

"Substantial performance of a contract (street paving) is substantial justice, where no damage is suffered by failure to perform literally."⁸⁸

Substantial performance, of course, depends upon the circumstances and the work under the contract of the particular improvement,⁸⁹ and this is often a mixed question of law and fact⁹⁰ to be determined in the first in-

⁸⁷ Paxton v. Bonner, 172 Mo. App. 479, 157 S. W. 986; Meyers v. Wood, 173 Mo. App. 564, 158 S. W. 909; Mueller v. Vancouver, 81 Wash. 384, 142 Pac. 868.

"This court has frequently held that if the improvement as constructed complied substantially with the original ordinance that is all that is required." Geneseo v. Schultz, 257 Ill. 273, 100 N. E. 926.

"It is undoubtedly the tendency of the decisions in this state to uphold the validity of tax bills where the facts will permit the court to say there has been a substantial performance of the work under the contract." Springfield v. Baxter, 180 Mo. App. 40, 165 S. W. 366, 368.

⁸⁸ Transfer Realty Co. v. Superior, 157 Wis. 587, 147 N. W. 1051, 1053.

⁸⁹ Alsmeier v. Adams (Ind. App. 1914), 105 N. E. 1033; Wills v. Burbank, 182 Mo. App. 68, 167 S. W. 608; Maryville v. Cox, 181 Mo. App. 254, 259, 260, 167 S. W. 1166; Trimble v. Stewart, 168 Mo. App. 276, 153 S. W. 1086; Gratz v. Kirkwood, 165 Mo. App. 196, 145 S. W. 870.

Slight variations in thickness of

pavement; held notwithstanding, there was a substantial compliance. Re Apple, 161 Iowa 314, 142 N. W. 1021, 1023, 1024.

In substance strict compliance with the law existed. Property owners have had fair opportunity to be heard and no one has been misled. Slight variance from the letter of the law is not important. Webb City v. Aylor, 163 Mo. App. 155, 147 S. W. 214.

"Mere irregularities in the method of carrying on the work will not be sufficient to release the property owners from the obligation of paying their assessments." Hendry v. Salem, 64 Or. 152, 129 Pac. 531.

Slight deviations from the contract in minor matters will be disregarded where the "evidence tends to show that as a net result the property holders have as good and substantial a street as they would have had in the event, a strict and literal compliance with the contract. There was a substantial compliance with the plans and specifications." Hendry v. Salem, 64 Or. 152, 129 Pac. 531.

⁹⁰ Re Mayden, 156 Iowa 157, 135 N. W. 571, 572.

stance by the appropriate authorities under the applicable law,⁹¹ subject, it is true, to judicial review.⁹² It has been said that substantial performance, as defined by the cases, permits only such omissions or deviations from the contract as are inadvertent or unintentional, not due to bad faith, which do not impair the structure as a whole and which are remedial without doing material damage to other parts of the improvement in tearing up and reconstructing, and which may without injustice be compensated by deductions from the contract price.⁹³

On the other hand, strict compliance with the terms of the contract finds support in judicial expressions.⁹⁴

⁹¹ Board of public works has authority to decide "whether there has been substantial performance, because substantial performance is performance." *Transfer Realty Co. v. Superior*, 157 Wis. 587, 147 N. W. 1051, 1053.

⁹² Board of local improvements or court to decide whether the improvement, as constructed, conforms substantially to the ordinance. *Price v. Board of Local Improvements*, 266 Ill. 299, 107 N. E. 611, affirming 187 Ill. App. 629.

⁹³ *Littell v. Webster County*, 155 Iowa 206, 215, 131 N. W. 691, 694; *Henry v. Jons*, 164 Iowa 366, 145 N. W. 909; *Re Apple*, 161 Iowa 322, 142 N. W. 1021; *Wingert v. Tipton*, 134 Iowa 97, 108 N. W. 1035, 111 N. W. 432.

⁹⁴ "A contractor should be held to a strict compliance with the terms of the contract in the doing of all work according to the terms of the contract as illumined and explained by the maps, drawings, plans and specifications. The contractor should take every reasonable precaution to advise himself as to what he is undertaking and

as to what he is reasonably expected to do." *Leary v. Water-vliet*, 160 N. Y. S. 1042, 97 Misc. Rep. 127.

Street paving contracts "ought to be strictly complied with, perhaps more so than under the rules heretofore announced by the court. * * * It is well known that in many instances improvements of this character are not well performed, and the contract and specifications are substantially ignored, at least in many particulars, and then the doctrine that there has been substantial compliance is invoked. To use an inelegant expression, but one in more or less common use at this time, the contractor simply does enough work to try to 'get by' under the rule of substantial performance. * * * As a matter of common honesty, such contracts ought to be strictly complied with and performed, and the city authorities should see to it that it is so." *Atkinson v. Webster City*, 177 Iowa 659, 158 N. W. 473, 480, 481.

§ 1926. Defective performance.⁹⁵

§ 1927. Same—waiver of defects.⁹⁶

§ 1928. Excuse for defective work or non-performance.⁹⁷

§ 1929. Acceptance of work by municipality—effect.

Judicial decisions generally hold that when work has been duly accepted by the proper municipal authorities, and there is no evidence of fraud, collusion, bad faith or palpable errors, such acceptance is usually conclusive that the work was performed according to the requirements of the contract.⁹⁸ At least, the decision of municipal authorities in good faith as to whether there has

⁹⁵ *Inland Const. Co. v. Rector*, 133 Ark. 277, 202 S. W. 712; *St. George Contracting Co. v. New York*, 205 N. Y. 121, 98 N. E. 387, reversing 128 N. Y. S. 393, 143 App. Div. 554; *Snouffer & Ford v. Tipton*, 161 Iowa 223, 142 N. W. 97; *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837.

Refusal to do the work on notice and request. *Reilly v. New York*, 156 N. Y. S. 529, 170 App. Div. 754.

Contractor wilfully violated and refused to comply with the contract. *Mallory v. Olympia*, 75 Wash. 245, 134 Pac. 914, 916.

Deduction from tax bill authorized when work was not completed as required. *Maryville v. Cox*, 181 Mo. App. 254, 263, 167 S. W. 1166.

⁹⁶ *Atlantic City v. Warren Bros. Co.*, 226 Fed. 372, 141 C. C. A. 202.

By acceptance of work. *Re Apple*, 161 Iowa 314, 142 N. W. 1021.

Right to waive or excuse failure to perform as required by contract denied after the completion of the work. *Board of Improvements, etc.*

v. Galbraith, 123 Ark. 619, 185 S. W. 474.

⁹⁷ *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837; *Reilly v. New York*, 156 N. Y. S. 529, 170 App. Div. 754; *Douglass & Varnum v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

Due to city. *St. George Contracting Co. v. New York*, 205 N. Y. 121, 98 N. E. 387, reversing 128 N. Y. S. 393, 143 App. Div. 554.

⁹⁸ *California. Barber Asphalt Paving Co. v. Jurgens*, 170 Cal. 273, 149 Pac. 560.

Illinois. McGovern v. Chicago, 281 Ill. 264, 118 N. E. 3, affirming 202 Ill. App. 139.

Indiana. Alsmeier v. Adams (Ind App.), 105 N. E. 1033, 1044, citing § 1929, vol. 4, ante.

Kentucky. Denton v. Carey-Reed Co., 169 Ky. 54, 183 S. W. 262, followed in *Henderson v. Carey-Reed Co.*, 180 Ky. 449, 202 S. W. 882; *Maysville v. Davis*, 166 Ky. 555, 179 S. W. 463, 468; *Russell v. Whitt*, 161 Ky. 187, 170 S. W. 609; *Creekmore v. Central Constr. Co.*, 157 Ky. 336, 163 S. W. 194,

been a substantial performance is quasi judicial, and binding on all persons affected thereby, and may be set aside by the courts only in case of fraud or substantial error.⁹⁹

But some cases hold that acceptance constitutes prima facie evidence only that the work has been substantially performed.¹

Undoubtedly the departure from the specifications may be so great as to suggest or raise an inference of fraud or palpable error² which would present an illustration

following *Lovelace v. Little*, 147 Ky. 137, 143 S. W. 1031.

Louisiana. *De Ridder v. Lewis*, 139 La. 903, 72 So. 447; *Shreveport v. Chatwin*, 139 La. 531, 71 So. 791.

Nebraska. *Katz-Craig Constructing Co. v. Cozad*, 101 Neb. 189, 162 N. W. 490.

Oregon. *Hendry v. Salem*, 64 Or. 152, 129 Pac. 531; *Lawrence v. Portland*, 85 Or. 586, 167 Pac. 587.

Utah. *Stott v. Salt Lake City*, 47 Utah 113, 129, 130, 151 Pac. 988, 993, quoting with approval part of § 1929, vol. 4, ante.

Wisconsin. *Transfer Realty Co. v. Superior*, 157 Wis. 587, 147 N. W. 1051.

Acceptance may be attack for fraud. *Woodruff Place v. Gorman*, 179 Ind. 1, 100 N. E. 296.

City must pay for. *Warren Bros. Co. v. Boyle* (Cal. App.), 183 Pac. 706.

Power to determine all questions as to performance, acceptance concludes all parties. *Hutchinson v. Spokane*, 72 Wash. 56, 129 Pac. 892.

See § 1938, post.

“It is well settled that, in the absence of fraud, an acceptance

of a public improvement by the governing body, or by the party authorized by the charter, ordinance or contract to accept it is conclusive on both parties.” *Morehouse v. Edmonds*, 70 Wash. 152, 126 Pac. 419.

⁹⁹ *State v. Indianapolis* (Ind. 1919), 123 N. E. 405, 408.

¹ Acceptance by city engineer, as per contract, make a prima facie case that the specifications and requirements have been complied with. If city denies it must show the failure and to what extent. *Charlotte v. Atlantic Bitulithic Co.*, 228 Fed. 456, 463, 143 C. C. A. 438, approving *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867, 94 C. C. A. 279.

Acceptance of sewer in particular case, held not binding on complaining property owners. *Alsmeyer v. Adams* (Ind. App.), 105 N. E. 1033, 1044, citing § 1929, vol. 4, ante.

Determination by city engineer of amount of work performed which is palpably erroneous on its face will be rejected. *State v. Seattle*, 93 Wash. 593, 161 Pac. 478.

² “It may be conceded that a city engineer’s act in approving

of the municipality having contracted for one thing and accepted another. In such case the right to judicial investigation indubitably exists.³

Acceptance of uncompleted work, of course, is not binding.⁴

Acceptance, moreover, is not a waiver of latent defects of which the municipality was ignorant at the time or which may thereafter appear. To constitute a waiver the acceptance must be under such circumstances as to show that the party accepting knew, or ought to have known, that the contract was not fully performed.⁵

The acceptance by the municipality and payment of the contract price, "where the work is not done in accordance with the contract, made without knowledge of the defects complained of, such defects not being dis-

an improvement of the character under consideration (street paving) when done in good faith and with due regard to the rights of the abutting owner will be conclusive as against all attacks dependent upon matters of judgment and honest differences of opinion as to the character of the work; but it ought not to be so held, we think, where the departures from specification are so great as to amount to an inference of fraud, or to constitute the work done substantially a different work from that contracted for." *Rudolph S. Blome v. Herd* (Tex. Civ. App.), 185 S. W. 53, 58.

³ The fact that the city accepted the work in opposition to the opinion of some of the property owners would not amount to a fraud, where there had been a substantial compliance with the contract. "At best there would be but a difference of opinion." The council having a discretion in such

matters and the right to decide, courts could not review their conduct, unless, as Mr. Cooley says in his work on Taxation (2nd Ed., p. 671) the authorities had contracted for one thing and accepted another, or, as was said in the case of *Haisch v. Seattle*, 10 Wash. 435, 38 Pac. 1131, the defects in the work were so open and notorious that the city must be presumed to have taken notice of the non-fulfillment of the contract on the part of the contractor." *Mueller v. Vancouver*, 81 Wash. 384, 142 Pac. 868.

⁴ Acceptance of sewer construction work as complete is not binding on property owners where to complete it, it is necessary to cement the joints in order to make it serviceable, and this should be required to be done before accepting the work. *Alsmeier v. Adams* (Ind. App.), 105 N. E. 1033, 1044, citing § 1929, vol. 4, ante.

⁵ *Seaside v. Randles* (Or. 1919), 180 Pac. 319, 324.

coverable by an ordinary inspection, will not be construed as a waiver or an estoppel to claim damages for such defects upon discovery thereof.”⁶

§ 1930. Same—what is acceptance.⁷

§ 1931. Delay and waiver of damages therefor.⁸

⁶ *Seaside v. Randles* (Or. 1919), 180 Pac. 319, 325.

⁷ See § 1938, post; § 1938, vol. 4, ante; *Alsmeier v. Adams* (Ind. App.), 105 N. E. 1033.

What constitutes acceptance by council. *Denny-Renton Clay & Coal Co. v. National Surety Co.*, 93 Wash. 103, 160 Pac. 1.

Action to enjoin acceptance where personnel of council changed. *Lovelace v. Little*, 147 Ky. 137, 143 S. W. 1031.

Acceptance of work, e. g., construction of aseptic tank, by resolution instead of by ordinance, held good. *Schueler v. Kirkwood*, 191 Mo. App. 575, 177 S. W. 760.

Acceptance with information of the real facts by the proper city officer is binding. “Personal knowledge on his part of the details of the work carried on under the eye of an inspector was not requisite to a valid acceptance.” *Burton v. Rutland*, 87 Vt. 224, 88 Atl. 729.

⁸ *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 652; *Ritchie v. Topeka*, 91 Kan. 615, 138 Pac. 618; *Wright v. Tacoma*, 87 Wash. 534, 151 Pac. 837; *Dietrich v. Seattle*, 95 Wash. 654, 164 Pac. 251.

Delay due to contractor, not excusable. *Droppelman v. Seattle*, 97 Wash. 177, 166 Pac. 248.

Waiver of delay. *Washington*

Paving Co. v. Tacoma, 78 Wash. 282, 138 Pac. 870.

No waiver of time limit. *Chester v. National Surety Co.*, 91 S. C. 17, 74 S. E. 37; *Ritchie v. Topeka*, 91 Kan. 615, 138 Pac. 618, 620.

The mere fact that the contractor was ordered to complete the work shortly before or after the expiration of the time for its completion, held under the circumstances of the particular case, insufficient to show a waiver by the city of its rights to damages for delay. *Egorf v. York*, 246 Pa. 455, 92 Atl. 695.

City allowed work to proceed and treated the contract as in force. *Douglass & Varnum v. Morrisville*, 89 Vt. 393, 95 Atl. 810, 824, 825.

A contractor to protect himself from delay due to change of specifications, is compelled to assert his claim at the time of the change. *Ryan v. New York*, 16 N. Y. S. 575, 179 App. Div. 181.

Damages for delay. *Burke v. Board of Improvements, etc.*, 120 Ark. 435, 179 S. W. 654.

Damages for delay under particular facts. *Ryan v. New York*, 143 N. Y. S. 974, 159 App. Div. 105.

Damages denied for delay under circumstances. *Burke v. Board of Improvement*, 120 Ark. 435, 179 S. W. 654.

§ 1932. Effect of partial performance.⁹**§ 1933. Time as essence of the contract.¹⁰**

Whether time is of the essence of a contract is ordinarily to be determined by the construction of the contract in the light of the settled principles of law upon that subject. The intention of the parties should prevail.¹¹

§ 1934. Right to abandon or annul contract.¹²

Delays caused in part by both parties. There was a change in plans after which the contractor had a reasonable time in which to complete the work. "The stipulated damages were for final completion delayed, and are not assessable for a reasonable time after the delay caused by the defendant (city) had ceased." *Leopold v. New York*, 171 N. Y. S. 524, 526, 184 App. Div. 244.

The city engineer in charge is without authority to determine a claim for damages due to delay, in the absence of a contract provision so authorizing. *Ruch v. York*, 233 Pa. 36, 81 Atl. 891.

⁹ *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837.

¹⁰ *Midtown Contracting Co. v. Goldsticker*, 150 N. Y. S. 805, 165 App. Div. 444; *Probert v. Girard Investment Co.*, 155 Mo. App. 344, 348, 137 S. W. 41.

No time fixed for beginning of work. *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S. W. 276.

Contract may leave to city engineer time for beginning of street work. *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995.

Where no time is fixed for the completion of the work by the ordinance or the notice to contractors, a time limit fixed by the contract is not of the essence, but meant that the work should be completed within a reasonable time. *Koch v. Shepherd* (Mo. App.), 193 S. W. 601, following *Allen v. Lab-sap*, 188 Mo. 692, 87 S. W. 926, 3, Ann. Cas. 306; *Hund Rackliffe*, 192 Mo. 325, 91 S. W. 500; *Paxton v. Bouner*, 172 Mo. App. 479, 157 S. W. 986.

If time is of the essence, there can be no recovery on a quantum meruit where the contractor fails to prosecute the work and the contract is terminated as provided therein. *Midtown Contracting Co. v. Goldsticker*, 150 N. Y. S. 805, 165 App. Div. 444.

¹¹ *Chester v. National Surety Co.*, 91 S. C. 17, 74 S. E. 37.

¹² *Welles v. Portuguese American Bank*, 215 Fed. 81; *New York v. Third National Bank*, 221 Fed. 175, 137 C. C. A. 75.

City may reserve right to cancel on default of contractor. *Federal Heating Co. v. Buffalo*, 163 N. Y. S. 336, 343, 99 Misc. Rep. 121.

Right of city to suspend the

§ 1935. Extension of time for performance.¹³**§ 1936. Completion by municipality of abandoned work.¹⁴**

whole or any part of the work. *Reilly v. New York*, 156 N. Y. S. 529, 170 App. Div. 754.

Failure to prosecute the work, the city having reserved the right to cancel, resulted in termination as contract stipulated on certificate of the architect. *Midtown Contracting Co. v. Goldsticker*, 150 N. Y. S. 805, 165 App. Div. 444.

What constitutes abandonment of public improvement. *Manley v. Marshfield*, 88 Or. 482, 172 Pac. 488.

Working men on contract more than eight hours a day in violation of labor law as ground of cancellation of contract. *McFarlane v. Mosier & Summers*, 141 N. Y. S. 143, 79 Misc. Rep. 460.

¹³ *Gunn v. Shewalter* (Mo. App.), 176 S. W. 484; *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 551-554, 172 S. W. 436; *Paxton v. Bonner*, 172 Mo. App. 479, 157 S. W. 986.

Extension of time cannot be made before the contract for the improvement is made, although power to extend the time for good cause shown was to be a stipulation in the contract as stated in the notice to bidders. *Mayes v. Adair County* (Mo.), 194 S. W. 58.

Extension should be made within the time the work should be done. *Barber Asphalt Paving Co. v. Kansas City Hydraulic Press Brick Co.*, 170 Mo. App. 503, 156 S. W. 749.

Long delay renders tax bills void. *Gilsonite Constr. Co. v. Field*, 157 Mo. App. 577, 138 S. W. 676.

Reasonable extension of time may be given where the time of completion is provided by the contract. *Hubbell Son & Co. v. Des Moines*, 168 Iowa 418, 150 N. W. 701, 703.

After time limit expired work was continued, completed and accepted, held observance of the contract. *Washington Paving Co. v. Tacoma*, 78 Wash. 292, 138 Pac. 870.

Extension of additional time for supplying municipal lighting by resolution, held not an extension or amendment of the franchise. *Portsmouth v. Portsmouth & Norfolk Corp.* (Va.), 95 S. E. 278.

Authorized by resolution, minor irregularities will not render void. *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

Usually by ordinance. *Barber Asphalt Paving Co. v. Hayward*, 248 Mo. 280, 154 S. W. 140.

What is not extension. *Chester v. National Surety Co.*, 91 S. C. 17, 74 S. E. 37.

Extension waiver, etc. *Cushing v. Bullock*, 151 Mo. App. 281.

¹⁴ *American Metal Ceiling Co. v. New Hyde Park Fire Dist.* 154 N. Y. S. 661, 91 Misc. Rep. 236; *Poe & Co. v. Brevard* (N. C.), 94 S. E. 420; *J. Jacob Shannon & Co. v. Lancaster*, 233 Pa. 194, 82 Atl. 55.

Contracts permit city to complete work where contractor fails at the expense of the contractor or to cancel the contract and seek to recover damages. *Federal Heat-*

§ 1937. Rights of third persons.¹⁵

ing Co. v. Buffalo, 163 N. Y. S. 336, 343, 99 Misc. Rep. 121.

Measure of damages is the cost of completing the contract. Inland Const. Co. v. Rector, 133 Ark. 277, 202 S. W. 712, 714.

Damages measured by the amount required to complete the work. "To make the city whole it may upon a satisfactory showing recover whatever amount is necessary in excess of the contract price to complete the work after its abandonment by the contractor. Proof of performance by the city of the uncompleted work does not constitute a condition precedent to its right of recovery." Kennett v. Katz Const. Co. (Mo.), 202 S. W. 558, 561.

Where there is not a cancellation of the contract, but a termination of the contractor's employment, the cost of completing the work by the city may be deducted from the contract price. E. F. Keating Co. v. New York, 146 N. Y. S. 222, 84 Misc. Rep. 561.

The surety company at the request of the city completed the contract. A reasonable price may be paid therefor. City on default was authorized by the contract to complete the work and to deduct the cost from the contract price, and even in the absence of this provision it would have had the right to recoupment. Powers Regulator Co. v. L. W. Taylor & Co., 225 Mass. 292, 114 N. E. 356, following Hunter v. Boston, 218 Mass. 535, 106 N. E. 145; Norcross Bros. v. Vose, 199 Mass. 81, 94, 95, 85 N. E. 468.

¹⁵ **Damage claims.** Injury done

by contractor, city not liable. T. B. Jones & Co. v. Ferro Concrete Const. Co., 154 Ky. 47, 156 S. W. 1060.

City's omission to enforce the penalty of the contract or to compel the contractor to proceed is not actionable in behalf of an abutting property owner. Burnham v. Milwaukee, 155 Wis. 90, 143 N. W. 1067, 1070.

Independent contractor: city not liable for debts of. Wilson v. Nelson (Okl.), 153 Pac. 1179, 1181.

"**Subcontractor**" included in a bond given by the contractor to pay for all labor and materials. such bond is not only to protect the city but all persons who supply labor and materials. New York Continental J. F. Co. v. Kenosha, 167 Wis. 371, 167 N. W. 451.

Materialman. Right to amount reserved by city by agreement with contractor. Spear v. Gaffney Board of Public Works, 99 S. C. 144, 82 S. E. 1010.

Contractor gave bond, but it contained no condition requiring the contractor to pay for any labor or materials furnished to him. Materialman brought suit in the name of the town for materials furnished. Held, would not lie. Grantville v. Fidelity & Deposit Co., 139 Ga. 53, 76 S. E. 575.

Suit against municipality on ground it had neglected to require bond, etc., held would not lie. It was duty of materialman to know whether city had taken necessary bond. Woodward Lumber Co. v. Grantville, 13 Ga. App. 405, 79 S. E. 221.

Statutes render municipality

§ 1938. Certificate of approval of work.¹⁶

In the absence of fraud, mistake, bad faith, arbitrariness, caprice or other like invalidating circumstances, it is generally held that the report of the engineer or architect, or other person in charge is conclusive upon the parties that the improvements were made and completed according to the terms of the contract.¹⁷

liable to materialmen on failure to require a sufficient bond to secure them. *McMullen Lumber Co. v. Pine Island*, 119 Minn. 60, 137 N. W. 192; *Gate City Lumber Co. v. Montesano*, 67 Wash. 594, 122 Pac. 26; *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140; *Crab Creek Lumber Co. v. Othello*, 81 Wash. 52, 142 Pac. 429; *American Mills Co. v. Montesano*, 63 Wash. 683, 116 Pac. 257.

City retained sum to settle claims for material. Bond was given by contractor. Held, where sum retained by city was insufficient to pay material claims, surety was not liable for balance to laborers and materialmen. *Hunter v. Boston*, 218 Mass. 535, 106 N. E. 145.

An ordinance compelled contractor to show settlements for all labor and materials, etc., and on failure to make such showing, the city was required to retain enough from the sum due the contractor to pay such unpaid or unsecured claims. A materialman brought suit in equity asking for a claim in the nature of a lien on the fund in the hands of the city which was denied. *Lombard Governor Co. v. Baltimore*, 121 Md. 303, 88 Atl. 140.

Materialmen cannot fix a lien upon public works due them for material furnished in the construc-

tion of such works under the Texas law. *General Bonding & Casualty Ins. Co. v. Dallas* (Tex. Civ. App.), 175 S. W. 1098.

One lending money to complete an improvement cannot claim to be a materialmen; neither can be claim by subrogation the rights of materialmen solely upon the ground that the money loaned was used to pay such claims. *Lion Bonding & Surety Co. v. First State Bank* (Tex. Civ. App.), 194 S. W. 1012.

Failure of city to exact a bond in a grade separation improvement to protect laborers, mechanics, materialmen and subcontractors does not render the city liable to a subcontractor since the city in requiring the work to be done was exercising its undoubted police power and not the power of contract. *Dixon v. Parker, Moran & Parker*, 102 Wash. 101, 172 Pac. 856.

¹⁶ *Charlotte v. Atlantic Bitulithic Co.*, 228 Fed. 456, 143 C. C. A. 38; *Herdman v. State*, 6 Boyce (Del.) 96 Atl. 199; *Baltimore v. Poe* (Md.), 104 Atl. 360; *Price v. Board of Local Improvements*, 266 Ill. 299, 107 N. E. 611, affirming 187 Ill. App. 629; *R. G. Packard Co. v. New York*, 137 N. Y. S. 9, 151 App. Div. 941.

¹⁷ *Dennis v. Williamina*, 80 Or.

It is uniformly held that it is the duty of an architect or an engineer or other person who has been selected by the parties to a contract to decide when the contract has been completed, and to exercise discretion and determine all other questions touching the materials and performance of the work, to exercise his honest judg-

486, 157 Pac. 799, 803, citing § 1938, vol. 4, ante; *Gray v. Cotton*, 166 Cal. 130, 134 Pac. 1145; *Baltimore v. Clark*, 128 Md. 291, 97 Atl. 911, 917; *Baumgartner v. Renton*, 96 Wash. 588, 165 Pac. 484; *Mallory v. Olympia*, 75 Wash. 245, 134 Pac. 914, 916; *State v. Coleman*, 71 Wash. 15, 127 Pac. 568.

Decision of engineer, held final where contract so provided. *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110.

Decision of officer as to non-payment for certain work, held binding on contractor. *Barker v. New York*, 242 Fed. 350, 155 C. C. A. 126.

Certificate of street superintendent, held conclusive where property owner neglected to appeal to the legislative board of the municipality. *McLaughlin v. Knobloch*, 161 Cal. 676, 120 Pac. 27, 29.

Engineer was made the arbiter of all controversies arising from claimed ambiguities in the excavation work. His certificate held conclusive unless his interpretation of the terms of the contract was palpably erroneous. *Mechanics' Bank v. New York*, 135 N. Y. S. 978, 151 App. Div. 87.

The grading contract provided that the chief of the bureau of highways shall in all cases decide every question which may arise relative to the performance of the contract, and such estimate and

decision shall be final and conclusive, and shall be a condition precedent to the right of the contractor to receive any money under the contract. This provision was held binding. *McHugh v. Philadelphia*, 62 Pa. Super. Ct. 550.

"There being no finding of fraud it follows that the certificate of the engineer and approval of the council are binding, and close the question so far as the amount to be paid for the work is concerned." *McGillivray v. Bremerton*, 90 Wash. 394, 156 Pac. 23, approving *Morehouse v. Edmonds*, 70 Wash. 152, 155, 126 Pac. 419; *State ex rel. Murphy v. Coleman*, 71 Wash. 15, 22, 127 Pac. 568; *Hutchinson v. Spokane*, 72 Wash. 56, 60, 129 Pac. 892.

Whether there has been a compliance with the specifications as to material, determined by the engineer in charge, is not conclusive but may be reviewed by the courts. *Algate v. Lansing*, 180 Mich. 484, 147 N. W. 561.

Under the Illinois Local Improvement Act, as concerns all questions of fact subject to investigation at a hearing in the county court, such court's judgment of finding and approving the certificate of the completion of the work is conclusive and not reviewable. *Nitsche v. Chicago*, 280 Ill. 268, 117 N. E. 500.

ment on the matters submitted to him. He cannot arbitrarily or capriciously or in bad faith refuse to certify to the truth and thus prevent a party from having the compensation which he has earned.¹⁸

§ 1939. Same—what officer to give certificate.¹⁹

§ 1940. Same—necessity for certificate.²⁰

§ 1941. Same—sufficiency of certificate.²¹

¹⁸ Morehouse v. Edmonds, 70 Wash. 152, 126 Pac. 419.

The commissioner of public works of the municipality given power to determine whether the work was done in accordance with the contract, etc. Chicago v. Agnew, 264 Ill. 288, 106 N. E. 252, reversing 182 Ill. App. 499.

Where estimate of engineer is not made in good faith, of course, it is not binding. Ritchie v. Topeka, 91 Kan. 615, 138 Pac. 618.

Certificate of engineer will not bind contractor where the engineer is mistaken in his construction and application of the law. Croton Falls Construction Co. v. New York, 154 N. Y. S. 76, 168 App. Div. 261.

¹⁹ California Portland Cement Co. v. Boone (Cal.), 183 Pac. 447.

Engineer. Willson & Adams Co. v. Mack Paving & Construction Co., 138 N. Y. S. 407, 78 Misc. Rep. 441.

The board of local improvements of the city. Price v. Board of Local Improvements, 266 Ill. 299, 107 N. E. 611, affirming 187 Ill. App. 629.

²⁰ Certificate necessary. Price v. Board of Local Improvements, 266 Ill. 299, 107 N. E. 611, affirming 187 Ill. App. 629; R. G. Packard

Co. v. New York, 137 N. Y. S. 9, 151 App. Div. 941.

By terms of the contract, engineer was to decide all question as to the work and when the contractor was to be paid; his decision held final and a condition to payment. Croton Falls Construction Co. v. New York, 154 N. Y. S. 76, 168 App. Div. 261.

Certificate and report of engineer to go to council who pass on acceptance of work. McGillivray v. Bremerton, 90 Wash. 394, 156 Pac. 23; State v. Coleman, 71 Wash. 15, 127 Pac. 568.

"There can be no doubt of the validity of a provision in a contract for work that the amount to be paid shall be determined by the estimate or certificate of an engineer or other person agreed upon." Gray v. Cotton, 166 Cal. 130, 134 Pac. 1145, 1147.

²¹ North Chicago v. McHugh, 289 Ill. 121, 124 N. E. 372.

Estimate of engineer, sufficiency. Gratz v. Kirkwood, 165 Mo. App. 196, 145 S. W. 870.

Amount, quality and acceptability of work as determined, held binding on subcontractor where contract so prescribed. Hughes v. Model Stoker Co., 124 Md. 283, 92 Atl. 845.

See § 1938, ante.

*c. Payment for work.***§ 1942. Liability of municipality to contractor.**

The rights and remedies of the contractor, and the liability of the municipality, and the defenses available will depend, of course, on the facts and conditions of each case as presented, in the light of the contract involved and the applicable local law.²²

22 Colorado. *Colorado Springs v. Coray*, 25 Colo. App. 469, 139 Pac. 1031.

Georgia. *Decatur v. Jaudon*, 136 Ga. 854, 72 S. E. 351.

Illinois. *Price v. Elgin*, 257 Ill. 63, 100 N. E. 133; *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872, affirming 185 Ill. App. 237.

Indiana. *Jordan v. Logansport*, 178 Ind. 629, 99 N. E. 1061; *Indianapolis v. American Const. Co.*, 176 Ind. 510, 96 N. E. 608; *Woodruff Place v. Gorman*, — Ind. —, 100 N. E. 296.

Iowa. *Gilcrest & Co. v. Des Moines*, 157 Iowa 525, 137 N. W. 1072.

Kentucky. *L. W. Hancock Co. v. Mt. Sterling*, 170 Ky. 207, 185 S. W. 856.

Michigan. *Algate v. Lansing*, 180 Mich. 484, 147 N. W. 561.

Missouri. *Municipal Securities Corp. v. Kansas City*, 265 Mo. 252, 177 S. W. 856; *Likes v. Rolla*, 184 Mo. App. 296, 167 S. W. 645.

Maryland. *Baltimore v. J. A. Kinlein & Co.*, 118 Md. 336, 84 Atl. 483.

New York. *Croton Falls Constr. Co. v. New York*, 154 N. Y. S. 76, 168 App. Div. 261; *Long Island Contracting & Supply Co. v. New York*, 204 N. Y. 73, 97 N. E. 483.

Oregon. *Hayden v. Astoria*, 84 Or. 205, 164 Pac. 729; *Manerud v. Eugene*, 62 Or. 196, 124 Pac. 662.

Pennsylvania. *Cunningham v. Philadelphia*, 245 Pa. 181, 91 Atl. 233.

Virginia. *Richmond v. Burton*, 115 Va. 206, 78 S. E. 560.

Washington. *Jahn Contracting Co. v. Seattle*, 100 Wash. 166, 170 Pac. 549.

United States. *Charlotte v. Atlantic Bitulithic Co.*, 228 Fed. 456, 143 C. C. A. 38; *New York v. Third National Bank*, 221 Fed. 175, 137 C. C. A. 75.

Sewage pumping station. *Baltimore v. Poe (Md.)*, 104 Atl. 360.

Under statutes, municipal corporations held not liable for certain improvements, as sewer construction. *Johnson v. McKenna*, 171 Ky. 380, 188 S. W. 480.

City held not liable on contract for planting trees because of lack of power to make such contract and the contractor was held bound with notice of the city's limitations. Under the law applicable the expense of planting shade trees in the streets and avenues must be paid by the owner of the property in the same manner that the expenses of sidewalks are provided for, namely, payment by the indi-

§ 1943. Same—default or neglect of municipality.²³

On the question of the general liability of a municipi-

vidual owner and not by the municipality. *New Butler v. Tucker* (Okla.), 153 Pac. 628.

May recover the contract price, irrespective of minor irregularities. *Schueler v. Kirkwood*, 191 Mo. App. 575, 177 S. W. 760.

Not liable for work done outside of contract, e. g., removing rock which fell outside of lines fixed by contract. *Barker v. New York*, 242 Fed. 350, 155 C. C. A. 126.

Waterworks system constructed as required by plans and specifications supplied engineer, municipality held liable. *Stonewall v. Stone*, 207 Fed. 540, 125 C. C. A. 139.

City cannot evade payment where the work has been performed agreeably to the provisions of the contract to the satisfaction of the designated municipal officer. *McGovern v. Chicago*, 281 Ill. 264, 118 N. E. 3, affirming 202 Ill. App. 139.

Sewer construction; breach of contract by contractor. *Reilly v. New York*, 156 N. Y. S. 529, 177 App. Div. 754.

Liability of city to contractor for its failure to do its duty under the contract, in action to recover for breach of contract. *New Castle v. Dingle*, 185 Ind. 626, 114 N. E. 221, 223, citing § 1942, vol. 4, ante.

Suit to enforce an equitable lien, denied. *Topeka v. Federal Union Surety Co.*, 213 Fed. 958, 130 C. C. A. 364.

Action to enforce claims of materialmen and laborers against sum due a contractor, held by the

city. *Hunter v. Boston*, 218 Mass. 535, 106 N. E. 145.

Action by materialman who furnished material to the contractor against the city. *Crab Creek Lumber Co. v. Othello*, 81 Wash. 52, 142 Pac. 429.

Counterclaim of city for failure of contractor to pay for labor and materials. *New York Continental Jewel Filtration Co. v. Kenosha*, 167 Wis. 371, 167 N. W. 451.

Set off as damages for failure to complete the works in time. *Egolf v. York*, 246 Pa. 455, 92 Atl. 695.

Damages for delay. *Ryan v. New York*, 166 N. Y. S. 575, 179 App. Div. 181.

Accounting in suit on paving contract, where the town completed the work. *Poe & Co. v. Brevard*, 174 N. C. 711, 94 S. E. 420.

Defense that contractor had wilfully and fraudulently refused and neglected to comply with his contract in specified particulars and had abandoned the same before its completion. *Mallory v. Olympia*, 75 Wash. 245, 134 Pac. 914.

Limitation bars contractor's claim. *Salfisberg v. Western Springs*, 189 Ill. App. 328.

Limitation bar equitable relief in a United States Court. *Benedict v. New York*, 247 Fed. 758.

Counterclaim by city for delay in completing purification plant. *C. T. Willard Co. v. New York*, 142 N. Y. S. 11.

²³ *New Castle v. Dingle*, 185 Ind. 626, 114 N. E. 221, 223, citing

pality for the payment of obligations payable from special assessments there is conflict in the decisions. Irrespective of the formulation of certain general rules, the determination is controlled by local legislation, the contract, and the special facts. If the work is to be paid by special assessments and the municipality fails to make lawful assessments, although it has full power to do so, the contract price of the improvements, it has been held, may be enforced against the city.²⁴

So failure to create an improvement district prior to beginning the improvement, as required, where such requirement is jurisdictional, it was held, rendered the city liable on improvement warrants issued by it in payment for street grading.²⁵

If the payment is to be solely by special assessments levied on property benefited and the municipality is not to be liable in any event, unauthorized action by the council in allowing rebates and reducing the legal rate of interest which results in a shortage to pay for the improvement, it has been held, will not render the city liable for the delinquent amount.²⁶

It is settled doctrine in Oregon that, where the expense for street improvements is to be paid through assessments upon abutting property and the municipality fails to observe the requirements of its charter in making the assessments, or is guilty of unreasonable delay in enforcing essential provisions with reference thereto, or in collecting or paying over the funds, the contractor has a right of action against the municipality arising, *ex delicto*, for the damages sustained, wherein the amount

§ 1943, vol. 4, ante; *Jonas v. West Palm Beach (Fla.)*, 79 So. 438; *St. George Contracting Co. v. New York*, 205 N. Y. 121, 98 N. E. 387, reversing 128 N. Y. S. 393, 143 App. Div. 554;; *Spearin v. New York*, 164 N. Y. S. 789, 178 App. Div. 898; *Mechanics' Bank v. New York*, 149 N. Y. S. 784, 164 App. Div. 128.

²⁴ *Oklahoma City v. Orthwein*, 258 Fed. (C. C. A.) 190, 195.

²⁵ *Merchants National Bank v. Devils Lake (N. D. 1919)*, 173 N. W. 748.

²⁶ *Mackenzie v. Anadarko (Okla. 1918)*, 178 Pac. 483.

due under his contract, with interest, is the measure of recovery; and this notwithstanding a provision in the contract that he shall look for payment only to the particular fund to be raised through the special assessment.²⁷

The Supreme Court of Iowa is committed to a like doctrine.²⁸ The rule, it has been held, is inapplicable to render the municipality liable for the improvement where the ordinance therefor was passed in violation of mandatory and jurisdictional requirements because the owners of a majority of abutting property had not signed the petition and the municipality was without power to enter into the contract for the improvement unless through valid ordinance passed in the manner prescribed by the charter. Such improvement contracts are therefore nullities by reason of the lack of power in the city to consummate them, including the manner of their consummation. There is a clear distinction between cases where the contract between the city and the contractor is a nullity and cases where the contract is good because the city fails or neglects to take some steps under the contract itself which it has, expressly or impliedly, undertaken to perform.²⁹

§ 1944. Same—assumpsit.³⁰

§ 1945. Same—quantum meruit.³¹

²⁷ *O'Neil v. Portland*, 59 Or. 84, 113 Pac. 655; *Jones v. Portland*, 35 Or. 512, 517, 59 Pac. 657; *Little v. Portland*, 26 Or. 235, 37 Pac. 911; *Commercial National Bank v. Portland*, 24 Or. 188, 33 Pac. 532, 41 Am. St. Rep. 854; *North Pacific L. & M. Co. v. East Portland*, 14 Or. 3, 6, 12 Pac. 4.

²⁸ *Ft. Dodge E. L. & P. Co. v. Ft. Dodge*, 115 Iowa 568, 89 N. W. 7; *Masters v. Rainier*, 238 Fed. 827, 829, 830.

²⁹ *Masters v. Rainier*, 238 Fed. 827, 830, approving *Citizens' Bank*

v. Spencer, 126 Iowa 101, 101 N. W. 643, a well considered case.

³⁰ *Vulcanite Paving Co. v. Philadelphia*, 239 Pa. 524, 86 Atl. 1086, 252 Pa. 600, 97 Atl. 928; *Ruch v. York*, 233 Pa. 36, 81 Atl. 891; *Callan v. Peck*, 37 R. I. 227, 91 Atl. 34; *Burton v. Rutland*, 87 Vt. 224, 88 Atl. 729; *Douglass & Varnum v. Morrisville*, 89 Vt. 393, 95 Atl. 810; *McGovern v. Boston*, 229 Mass. 394, 118 N. E. 667.

³¹ *Charlotte v. Atlantic Bitulithic Co.*, 228 Fed. 456, 143 C. C. A. 38, 43; *Snouffer & Ford v. Tipton*,

§ 1946. Extra pay for extra work.

Liability for extra work, that is, generally speaking, work outside of the provisions of the contract,³² frequently including both labor and materials,³³ is to be

161 Iowa 223, 142 N. W. 97; Mallory v. Olympia, 87 Wash. 215, 152 Pac. 996.

Where city delayed the work and as a result thereof the contractors were put to considerable additional expense they were permitted to recover on a quantum meruit. Hayden v. Astoria, 84 Or. 205, 164 Pac. 729.

Action on quantum meruit barred where there was a breach of the contract and the town completed the work. Poe & Co. v. Brevard, 174 N. C. 710, 94 S. E. 420.

Violation of labor law forbidding employees to work over eight hours, held not to justify contractors to regard the contract as abrogated and seek to recover for work done on a quantum meruit. Medina v. Title Guaranty & Surety Co., 136 N. Y. S. 786, 152 App. Div. 307.

"This court has endeavored to hold municipalities to the same standard of right and wrong that the law imposes upon individuals." Mallory v. Olympia, 83 Wash. 499, 145 Pac. 627, 630.

"Municipal repudiation of honest indebtedness which the municipality intended to contract and could have lawfully contracted, is no more to be tolerated than individual repudiation of honest indebtedness merely because it was not incurred in pursuance of a duly executed express contract, unless the municipal charter or the statutes prohibit the municipality

from incurring any liability by implication." Long v. Lemoyne Borough, 222 Pa. 311, 318, 71 Atl. 211.

Contract was illegal because of irregularities in the preliminary proceeding, but state had power to make the paving contract, and the city held liable where it adopted and used the street. A majority of the court express the opinion that the case was within the general principle that where a municipal corporation receives a service, or property, or an improvement, which it renders and uses, common honesty requires that it make payment therefor, where the matter is not tinctured with moral turpitude or altogether beyond the statutory power of the corporation to acquire or procure. Ritchie v. Wichita, 99 Kan. 663, 669, 163 Pac. 176.

³² Slight change is not "extra work" but work provided for in the contract. McHugh v. Tacoma, 76 Wash. 127, 135 Pac. 1011.

What part is extra work, is sometimes a question of fact, or jury question. Cunningham v. Philadelphia, 245 Pa. 181, 91 Atl. 233; Douglass & Varnum v. Morrisville, 89 Vt. 393, 95 Atl. 810.

Sewer construction; extra pay for extra work due to overflow, denied under contract. Callan v. Peck, 37 R. I. 227, 91 Atl. 34.

³³ "Extra work," held to include both labor and material, and a use of such words in an assignment was held intended to assign

ascertained from the terms of the local law,³⁴ whether such work was necessary, whether duly authorized,³⁵ and

all that such words meant in the contract. *Atlantic City v. Warren Bros. Co.*, 226 Fed. 372, 386, 141 C. C. A. 202, citing § 1946, vol. 4, ante.

³⁴ Pay for extra work was authorized by passage of an ordinance by a two-thirds vote. The purpose of such law is to permit municipal authorities to pay for benefits actually received by the city though not embraced or provided for in a written contract for municipal improvements. In a word, it enables a municipality to pay an honest debt to a contractor under a written contract if two-thirds of the membership of the council with the approval of the mayor think that it ought to be paid as a moral obligation though as a legal one it has no existence. "But, while this is true, it is equally true that there is no authority in councils to direct extra payment for any work or materials which are included in a written contract with the city. For what is done under such contract, the contractor can receive from the municipal treasury only what the contract stipulates is to be paid him and the councils cannot give him more." *Cunningham v. Dunlap*, 242 Pa. 341, 89 Atl. 129.

³⁵ **Authorization.** "When a contract provides expressly that no extra work would be allowed unless upon an itemized statement of such work, a written order covering the same shall be given by the architect in charge, such provision is binding and controlling;

the architect having no authority to bind the owner by oral orders to contractors, for the reason that the contract expressly limits the authority of the architect. It has been well said that an agent cannot enlarge his own powers by waiving the limitations thereon." *National Bank v. Watervliet*, 160 N. Y. S. 1072, 97 Misc. Rep. 121.

Must be authorized as specified in contract. *Bunting Bull Co. v. Mt. Vernon*, 217 N. Y. 510, 112 N. E. 442, affirming 147 N. Y. S. 1101, 163 App. Div. 856.

Where contract requires an order for extra work to be in writing this provision must be observed. *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110.

Only an order of city engineer. *Richmond v. I. J. Smith & Co.*, 119 Va. 198, 89 S. E. 123.

No claim for extra work shall be allowed unless previously ordered by engineer in writing. *Atlantic City v. Warren Bros. Co.*, 226 Fed. 372, 141 C. C. A. 202.

Allowed where city radically changed plans involving extra cost. *Kieburz v. Seattle*, 84 Wash. 196, 146 Pac. 400.

Extra work required, recognized by the proper municipal authorities authorizes extra pay therefor. *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837.

A contractor may recover for extra work, not included in the contract, done at order of the engineer in charge. *Ryan v. New York*, 166 N. Y. S. 575, 179 App. Div. 181.

To give extra pay for extra

if not, whether the provisions relating to authorization were waived,³⁶ whether such work is of value, whether accepted and used, and all other relevant circumstances.³⁷

work the contract provisions relating thereto should be observed. *Thomsen v. Kenosha*, 165 Wis. 204, 161 N. W. 735.

³⁶ *McGovern v. Salem*, 214 Mass. 358, 101 N. E. 974; *National Bank v. Watervliet*, 160 N. Y. S. 1072, 97 Misc. Rep. 121; *Douglass & Varnum v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

The contract provided that agreement shall be reached upon the price of extra work in writing, otherwise no recovery could be had therefor. The city accepted the work, and such acceptance precluded the city for urging observance of such contract provision. *Waldy v. Seattle*, 93 Wash. 407, 161 Pac. 65.

³⁷ *California. Gray v. Cotton*, 166 Cal. 130, 134 Pac. 1145.

Maryland. Baltimore v. Clark, 128 Md. 291, 97 Atl. 911.

Missouri. Likes v. Rolla, 184 Mo. App. 296, 167 S. W. 645; *Mullens v. Kansas City*, 268 Mo. 444, 188 S. W. 193.

Minnesota. Carson v. Dawson, 129 Minn. 543, 152 N. W. 842.

New York. Peterson v. New York, 205 N. Y. 323, 98 N. E. 501; *Dunn v. New York*, 205 N. Y. 342, 98 N. E. 495.

Pennsylvania. McKallip v. Altona (Pa. 1919), 108 Atl. 408; *Cunningham v. Philadelphia*, 245 Pa. 181, 91 Atl. 233; *Union Paving Co. v. Philadelphia* (Pa. 1919), 107 Atl. 370.

Rhode Island. Callan v. Peck, 37 R. I. 227, 91 Atl. 34.

Washington. International Contract Co. v. Seattle, 70 Wash. 504, 127 Pac. 115; *First Nat. Bank v. Seattle*, 71 Wash. 122, 127 Pac. 837; *International Contract Co. v. Tacoma*, 79 Wash. 311, 140 Pac. 373; *Lang v. Spokane*, 87 Wash. 458, 151 Pac. 820.

Wisconsin. Van Valkenburgh v. Milwaukee, 157 Wis. 55, 143 N. W. 1052.

In the absence of provision as to time, payment should be made within a reasonable time. *Cranford Co. v. New York*, 134 N. Y. S. 839, 150 App. Div. 195.

City cannot be compelled to pay for extra work where there is neither moral nor legal obligation. *Langstreth v. Philadelphia*, 245 Pa. 233, 91 Atl. 667.

Where the contract does not require the contractor to do what the city compels him to do and the extra work is done and the city receives the benefit, the city should pay a reasonable value therefor. *National Bank v. Watervliet*, 160 N. Y. S. 1072, 97 Misc. Rep. 121.

To recover for extra work contractors must show that the municipality required them to do the extra work notwithstanding they protested and claimed that the extra work was not included in their contract. *Leary v. Watervliet*, 223 N. Y. 586, 118 N. E. 849, 851, approving *Borough Construction Co. v. New York*, 200 N. Y. 149, 93 N. E. 480, 140 Am. St. Rep. 633.

§ 1947. Method and time of payment.³⁸**§ 1948. Payment by special assessments.³⁹**

If the special assessments are not or cannot be realized, in whole or in part, due to neglect or defect or invalidity of the proceeding arising from any cause, whether there is municipal liability to the contractor for the whole or any part of the work performed is to be determined from the controlling law, and the terms of the contract.⁴⁰

Liability of city for street grading. *Jonesboro v. Hemingway*, 114 Ark. 574, 170 S. W. 82.

Extra work is a question of fact, notwithstanding contract gave final decision on all questions relating to the work to the city engineer. *Ahrens v. Reading*, 261 Pa. 100, 104 Atl. 511.

Extra compensation to a contractor by an ordinance passed by a two-thirds vote authorized. *Vare v. Walton*, 236 Pa. 467, 84 Atl. 962.

³⁸ *Vulcanite Paving Co. v. Philadelphia*, 252 Pa. 605; 97 Atl. 930.

Voucher of city accepted by contractor, held not payment. *Terre Haute Vittrified B. Co. v. Montgomery County I. & T. Co.*, 163 Ill. App. 441.

By warrants. *Com. v. Walton*, 236 Pa. 220, 84 Atl. 766.

As contract provides, installments of the contract price upon monthly estimates as the work progressed and all balance within named time after the final estimate. *State ex rel. v. Ely*, 129 Minn. 40, 151 N. W. 545.

Part by bonds and part in cash or warrants payable out of the general fund. *Jennings v. Pasco*, 82 Wash. 335, 144 Pac. 37.

To be paid out of city's current

revenues; by so contracting no debt is to be created within the meaning of the state constitution forbidding cities from creating debt, etc. *Harrold v. Huntington*, 74 W. Va. 528, 82 S. E. 476.

³⁹ *First National Bank v. Kelly*, 159 Iowa 312, 139 N. W. 564; *Jennings Heights L. & I. Co. v. St. Louis*, 257 Mo. 291, 165 S. W. 741; *Like v. Rolla*, 184 Mo. App. 296, 167 S. W. 645; *Dennis v. Willamina*, 80 Or. 486, 157 Pac. 799; *Chehalis v. Robinson*, 87 Wash. 690, 152 Pac. 696.

By installments, surplus to be refunded to taxpayers. *Donahue v. La Grange*, 263 Ill. 607, 105 N. E. 762, 183 Ill. App. 222.

⁴⁰ Where the contract was to be satisfied by special tax bills, the city is not liable. *Municipal Securities Corp. v. Kansas City*, 265 Mo. 252, 177 S. W. 856.

Where work was to be paid for by special assessment and such assessments cannot be enforced against the property of the United States the city is not liable for the amount of such unpaid assessments. The contractor was bound to take notice of the city's powers in the premises. *Enid v. Warner-Quinlan Asphalt Co. (Okl.)*, 161 Pac. 1092.

A city's unreasonable delay in levying assessments renders it liable to the contractor for loss of interest on such assessments under a law allowing interest on them as soon as certificates therefor are issued.⁴¹

Void tax bills does not make city liable. *Cotter v. Kansas City*, 251 Mo. 224, 229, 158 S. W. 52, distinguishing *Fisher v. St. Louis*, 44 Mo. 482, decided under different laws.

On the contrary where special assessments are void the city is liable. *Gilcrest v. Des Moines*, 157 Iowa 525, 137 N. W. 1022.

"It seems to be the generally accepted rule that in the absence of express provisions to the contrary, a municipal corporation impliedly contracts to cause a valid assessment to be made when it enters into a contract for a street improvement which is to be paid for by special assessment, and that when an assessment is invalid because of some defect in the proceedings which is chargeable to it, the municipal corporation is holden to the contractor. We are of the opinion that the above rule is a reasonable one and that it is applicable to the case before us." *Freese v. Pierre*, 37 S. D. 433, 158 N. W. 1013, 1015.

Where the contractor agrees to take compensation out of a fund raised by special assessments or some special or limited fund, he cannot assert a general liability or take judgment to be satisfied out of the general fund or the current expense fund of the municipality. *Willapa Harbor Sand & G. Co. v. Pacific County*, 103 Wash. 309, 174 Pac. 450; *State ex rel. v. De Matos*, 88 Wash. 35, 152 Pac. 721;

State ex rel. v. Superior Court, 86 Wash. 685, 151 Pac. 108.

Contract provided that the city shall be at no expense for the paving except for intersections and in front of unassessable property, and that for all work done the contractor was to be paid in assessment bills on abutting property, held city not liable for any part of the work, except as agreed, regardless of their validity or legality due to any cause whatever. *Vulcanite Paving Co. v. Philadelphia*, 239 Pa. 524, 86 Atl. 1086.

Municipality, held liable for improper distribution of special assessment fund. *Wells v. Wilmette*, 193 Ill. App. 30.

Where special assessment insufficient, liability of city for deficiency out of its general funds. *Morris v. Sheridan*, 86 Or. 224, 167 Pac. 593.

Liability of municipality under the law and contract limited to amounts of special assessments actually collected and paid to it. *Donahue v. La Grange*, 263 Ill. 607, 105 N. E. 762, 183 Ill. App. 222.

Failure to proceed to have special assessment levied and collected to pay for the improvement creates a general liability against the city, e. g., action et delicto for damages. *Morris v. Sheridan*, 86 Or. 224, 167 Pac. 593.

⁴¹ "In undertaking to make these assessments the city impliedly refers and agrees that it will do so in a reasonable time,

§ 1949. Conditions as to payment.⁴²§ 1950. Payment out of special fund.⁴³§ 1951. Amount of recovery.⁴⁴

and during this reasonable time the contractor is out of the use of his money and cannot have interest thereon for the reason that interest cannot be included in the assessment or reassessment. When the assessments are made and certificates issued they draw interest from date until paid under the statutes in force in this state. Now we have held that if the city through negligence or otherwise fails to make and deliver valid assessments and assessment certificates to the contractor where under the terms of the contract he is to receive his pay in such assessments or assessment certificates, the city is liable to the contractor and judgment may be rendered against it. *Ft. Dodge Co. v. Ft. Dodge*, 115 Iowa 568, 87 N. W. 7; *Slutts v. Dana*, 138 Iowa 256, 115 N. W. 1115. These cases dispose of the thought suggested by appellee that the city is not liable because its act is either legislative or judicial. Indeed, it scarcely need be said that its act is not of either character but wholly administrative." *Field v. Barber Asphalt Paving Co.*, 117 Fed. 925; *Crawford v. Mason*, 123 Iowa 301, 98 N. W. 795; *Turner Imp. Co. v. Des Moines*, 150 Iowa 277, 136 N. W. 656, 658.

⁴² *Baltimore v. M. A. Talbott & Co.*, 120 Md. 354, 87 Atl. 941.

⁴³ See § 2179, vol. 5, ante.

California. *Ott Hardware Co. v. Holmberg*, 32 Cal. App. 229, 162 Pac. 911, 913.

Illinois. *Salisbury v. Western Springs*, 189 Ill. App. 328.

Louisiana. *Roth v. Thibodaux*, *137 La. 210, 68 So. 412.

New York. *People ex rel. v. Smith*, 134 N. Y. S. 319, 149 App. Div. 382.

Oregon. *Carruthers v. Astoria*, 72 Or. 50, 143 Pac. 899.

Washington. *State v. Centralia*, 93 Wash. 401, 161 Pac. 74; *State v. Tacoma*, 92 Wash. 591, 159 Pac. 765.

United States. *Benedict v. New York*, 247 Fed. 758.

Municipality is liable for the wrongful distribution of a special assessment fund. *Wells v. Wilmette*, 193 Ill. App. 30.

⁴⁴ *Gray v. Cotton*, 166 Cal. 130, 134 Pac. 1145.

According to contract terms, or as modified, as where city agreed to give a sum in addition to contract price. *McGillivray v. Bremerton*, 90 Wash. 394, 156 Pac. 23.

When the work is performed the contract price is the measure. *International Contracting Co. v. Tacoma*, 79 Wash. 311, 140 Pac. 373.

Estimates and determination of city engineer. *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110; *Baltimore v. M. A. Talbott & Co.*, 120 Md. 354, 87 Atl. 941.

As work estimated by city engineer, where by the contract he was made the final arbiter in event of legitimate dispute. *Jennings v. Pasco*, 82 Wash. 335, 144 Pac. 37.

§ 1952. Interest on sum due.⁴⁵§ 1953. Retention of part by municipality.⁴⁶

⁴⁵ National Surety Co. v. American Savings Bank & Trust Co., 101 Wash. 213, 172 Pac. 264; Wright v. Tacoma, 87 Wash. 334, 151 Pac. 837; Oklahoma City v. Hoehler (Okl.), 175 Pac. 198; Beaumont v. Masterson (Tex. Civ. App.), 142 S. W. 984, 987, 988.

"We have no hesitancy, therefore, in holding upon the weight of authority that towns and cities in business transactions are liable for interest, in the absence of statute, or decisions of our courts putting them on a different basis, the same as private corporations and individuals." Golden v. Western Lumber & Pole Co., 60 Colo. 382, 154 Pac. 95, 97, construing Montezuma County v. Wheeler, 39 Colo. 207, 89 Pac. 50.

Interest is allowable from the time of the completion of the improvement until payment. McHugh v. Tacoma, 76 Wash. 127, 135 Pac. 1011, 1016, following Parks v. Elmore, 59 Wash. 584, 110 Pac. 381.

Unreasonable delay beyond the time payment is due justifies the allowance of interest. Ryan v. New York, 143 N. Y. S. 974, 979, 159 App. Div. 105.

Accepting partial payment from the municipality long after due by the contractor and proceeding to finish the work, held a waiver of the "right to interest upon the deferred payment as damages for the delay which was the measure of damages." Mechanics' Bank v. New York, 149 N. Y. S. 784, 164 App. Div. 128.

Under a law allowing interest on assessment certificates as soon as issued, the contractor is entitled to recover from the municipality the loss of interest due to its unreasonable delay in levying the assessment. J. W. Turner Imp. Co. v. Des Moines, 150 Iowa 277, 136 N. W. 656.

Interest to be computed on tax bills at the rate provided by law to the date of the judgment, but the judgment bear the legal rate from the date of its rendition. Stover v. Springfield, 167 Mo. App. 328, 342, S. W.

Where the ordinance authorizing the work specifies the interest rate, such rate applies to amended tax bills. Boonville v. Stephens, 238 Mo. 339, 358, 141 S. W. 1111.

⁴⁶ Massachusetts. Hunter v. Boston, 218 Mass. 535, 106 N. E. 145; Loonie v. Wilson (Mass.), 124 N. E. 272.

Maryland. Baltimore v. M. A. Talbott & Co., 120 Md. 354, 87 Atl. 941; Kellas & Co. v. Slack, 129 Md. 535, 99 Atl. 677; Lombard Governor Co. v. Baltimore, 121 Md. 303, 88 Atl. 140.

Pennsylvania. McKallip v. Altoona (Pa. 1919), 108 Atl. 408.

Texas. Beaumont v. Masterson (Tex. Civ. App.), 145 S. W. 1079.

Washington. Wright v. Tacoma, 87 Wash. 334, 151 Pac. 837; Mitchell v. Berlin-McNitt Co., 91 Wash. 582, 158 Pac. 264.

United States. New Amsterdam Casualty Co. v. Astoria, 256 Fed. 560.

Right to retain a portion of the

d. Liens.§ 1954. **Liens for labor and material.**⁴⁷

That the state has authority to give a lien for labor

amount due the contractor, to secure repairs for a period of five years as provided in the contract, was denied, where the city had taken a bond. *Carolina National Bank v. Greenville*, 97 S. C. 291, 81 S. E. 634, 637.

Where the contractor's work is defective or he has failed to complete it, the city cannot arbitrarily retain a part of the sum due the contractor as against lienors, where the contractor has given a bond. The city should seek reimbursement by resorting to the bond of indemnity. *Terre Haute Vitriified B. Co. v. Montgomery County L. & T. Co.*, 163 Ill. App. 441, 453.

Provision in an improvement contract that the city may withhold payments under the contract until labor and material claims are satisfied "amounts to no more than a permission of the city to exercise a discretion in the premises. It creates no duty to any one on the city's part." *National Surety Co. v. American Savings Bank & Trust Co.*, 101 Wash. 213, 172 Pac. 264, 268.

Statute required city to retain from money due contractor sufficient amount to pay laborers and materialmen. *Jones Lumber Co. v. Guaranty State Bank & Trust Co.* (Tex. Civ. App.), 157 S. W. 472.

Laws authorize cities to withhold payment until claims against contractor have been settled. *Mitchell v. Berlin-McNitt Co.*, 91 Wash. 582, 158 Pac. 264.

Laborers and materialmen. *Flint v. Chicago Bonding & Surety Co.*, 202 Mich. 438, 168 N. W. 528.

Retained by city under contract terms to pay for labor and materials. *Boone v. Gray*, 162 Iowa 695, 144 N. W. 709.

By provision of contract, city was to retain a sufficient amount to pay claims against which liens had been filed. *Riverside Contracting Co. v. New York*, 218 N. Y. 596, 113 N. E. 564, affirming 150 N. Y. S. 1109, 165 App. Div. 972.

Retain by city money due to pay materialmen by contract. *Spear v. Gaffney Board of Public Works*, 99 S. C. 144, 82 S. E. 1010.

Where a municipality withholds funds by virtue of a law so providing in order to permit claims to be filed against it, it is thereby created a trustee for persons holding claims against the contractor and hence if in violation of a statute the city turns over the money to the contractor, it may be held liable to all claimants. *Western Lumber & Pole Co. v. Golden*, 23 Colo. App. 461, 130 Pac. 1027.

⁴⁷ California. *Los Angeles Stone Co. v. National Surety Co.*, 176 Cal. 247, 173 Pac. 79, 83; *Los Angeles v. Kautz* (Cal. App. 1919), 179 Pac. 716.

Colorado. *Western Lumber & Pole Co. v. Golden*, 23 Colo. App. 461, 130 Pac. 1027.

Illinois. *Williams Co. v. McCarthy*, 284 Ill. 604, 120 N. E. 485; *Municipal Engineering & Contracting Co. v. Farmer City*, 193 Ill.

and material entering into an improvement or to require

App. 457; *Alexander Lumber Co. v. Farmer City*, 272 Ill. 264, 111 N. E. 1012.

Kansas. *Fidelity & Deposit Co. v. Stafford*, 101 Kan. 66, 165 Pac. 837.

New York. *Sexauer & Lanke v. Burke & Sons Co.* (N. Y. 1920), 127 N. E. 329; *Harley v. Plant*, 210 N. Y. 405, 104 N. E. 946; *Willard Co. v. New York*, 142 N. Y. S. 11; *Buess v. New York*, 141 N. Y. S. 426, 80 Misc. Rep. 391.

Texas. *Lion Bonding & Surety Co. v. Trussel Concrete Steel Co.* (Tex. Civ. App.), 204 S. W. 1176.

Public improvement. Contract for the removal of ashes and refuse was held not a "public improvement," authorizing a lien. *Riverside Contracting Co. v. New York*, 218 N. Y. 596, 113 N. E. 564, affirming 150 N. Y. S. 1109, 165 App. Div. 972.

"Improvement" as used in New York law held to include material furnished to maintain temporary pavements, mains, pipes, wires, vaults, etc., during construction of a rapid transit railroad in public ways. *Church E. Gates & Co. v. John F. Stevens Construction Co.*, 220 N. Y. 38, 115 N. E. 22, affirming 154 N. Y. S. 605, 169 App. Div. 221.

"Material" defined and discussed under New York law. *Church E. Gates & Co. v. John F. Stevens Construction Co.*, 154 N. Y. S. 605, 609-611, 169 App. Div. 221.

Statute gave a lien for "material," but did not specify the kinds of material for which it

authorized a lien. A steam shovel leased for a specified term to the contractor for use on the improvement is not "material." *Troy Public Works Co. v. Yonkers*, 207 N. Y. 81, 100 N. E. 700, approving and following *Schaghticoke Powder Co. v. Greenwich & J. Ry. Co.*, 183 N. Y. 306, 76 N. E. 153, 2 L. R. A. (N. S.) 288, 111 Am. St. Rep. 751, 5 Ann. Cas. 443, where it is said that "a steam shovel, an engine and boiler, picks, shovels, crowbars and the like are tools and appliances which while used in the doing of the work, survive the performance and remain the property of their owner."

Labor, what constitutes furnishing. *Post & McCord v. New York*, 148 N. Y. S. 568, 574, 86 Misc. Rep. 300.

Property subject to lien. Liens against one contract cannot be paid out of moneys arising from another contract. *C. T. Willard Co. v. New York*, 142 N. Y. S. 9, 11, 81 Misc. Rep. 48, following *Quinlan v. Russell*, 94 N. Y. 350.

If anything is due to the contractor pursuant to the terms of the contract when the lien is filed, it attaches to that extent. *American Radiator Co. v. New York*, 223 N. Y. 193, 119 N. E. 391.

Where under the contract a municipality may have liquidated damages due to delay in the completion of the improvement, and is therefore entitled to charge such amount against the contractor "it necessarily follows that the lien of a materialman can attach only to the balance remaining due from

a bond in lieu thereof, is well settled.⁴⁸

Such liens are regulated by legislative enactment.⁴⁹

The intention has been, as frequently expressed in judicial decisions, to assimilate so far as practicable,

the municipality to the contractor." *Wood v. Ocean City*, 85 N. J. Eq. 328, 96 Atl. 489.

Priority determined by service of notice. *Riverton Board of Education v. Tait*, 80 N. J. Eq. 94, 83 Atl. 459, affirmed 81 N. J. Eq. 161, 86 Atl. 379.

Lien for material held prior to the lien of a contract. *American Metal Ceiling Co. v. New Hyde Park Fire District*, 159 N. Y. S. 648, 172 App. Div. 774.

Priority—assignment. Liens of laborers and materialmen filed after the assignment of funds deposited to pay the contractor are to be postponed by virtue of statute. *Federal Heating Co. v. Buffalo*, 163 N. Y. S. 336, 99 Misc. Rep. 121.

When assignment of funds on deposit to pay the contractor are subject to claims of materialmen and laborers which had accrued prior to the assignment under local ordinance prescribing that such claims shall be preferred. *Federal Heating Co. v. Buffalo*, 163 N. Y. S. 336, 99 Misc. Rep. 121.

A general assignee for the benefit of creditors takes his title subject to liens filed by laborers, mechanics, materialmen, subcontractors subsequent to the assignment but within the time prescribed by statute. *Church E. Gates & Co. v. John F. Stevens Construction Co.*, 220 N. Y. 38, 115 N. E. 22, affirming 154 N. Y. S. 605, 169 App. Div. 221.

⁴⁸ "The state has power to regulate rights in its soil; to give a lien for labor and material entering into an improvement; to deny a lien where the soil is that of a municipality; in such case to provide a bond in the place of the lien; to declare the purpose and effect of such arrangement and the equities and rights growing out of it." *Columbia Digger Co. v. Rector*, 215 Fed. 618, 632.

⁴⁹ "It is well settled by the decisions of this state that materialmen, laborers, etc., cannot fix a lien upon public works for money due them for material furnished or labor performed in the construction of such works." *General Bonding & Casualty Ins. Co. v. Dallas* (Tex. Civ. App.), 175 S. W. 1098; *Jones Lumber Co. v. Guaranty State Bank & Trust Co.* (Tex. Civ. App.), 157 S. W. 472, 475.

"There can be no mechanics' lien on public property unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and would also be incapable of enforcement; public property not being subject to forced sale." *Western Lumber & Pole Co. v. Golden*, 23 Colo. App. 461, 130 Pac. 1027, quoting from many text-writers.

To constitute a lien the claim must be filed within the time named in the statute. *Independent School Dist. v. Hall*, 159 Iowa 607, 140 N. W. 855.

the regulations as to liens in respect to private real estate and liens in respect to improvements upon municipal contracts. "One difference which necessarily exists is as to the subject-matter to which a lien applies. In the case of private real property the lien applies directly to the property improved; but in the case of a public improvement, since it would be intolerable that public property should be encumbered with liens in favor of contractors and others, it is provided that the lien shall attach to the moneys in the hands of the municipality set apart or appropriated for the payment of the sums to become due upon the contract for the improvement, and a corresponding difference is made as to the officers in which liens, claims, assignments, and encumbrances of every nature are to be filed or recorded. In short, in the case of a public improvement the money to become due from the municipality under the contract for the improvement is substituted for and stands in the place of the real property affected by the improvement. In all other respects the regulations affecting the two classes of liens are similar."⁵⁰

Statutes providing for liens are liberally construed. The right to the lien, it has been said, should be determined upon equitable principles rather than upon strict legal rules. Such laws are highly remedial, and must in furtherance of justice receive a liberal construction and application so as to accomplish their real object. Prior to the enactment of such laws those who furnished materials or performed labor for any contractor on any public building or structure were required to look for the compensation to the contractor alone who constructed the building or structure.⁵¹

§ 1955. Filing notice of lien.⁵²

⁵⁰ *Standard Sand & Gravel Co. v. New York*, 157 N. Y. S. 447, 449, 172 App. Div. 80.

⁵¹ *Mullen v. Vondor Horst Bros.*, 44 Utah 300, 140 Pac. 130.

⁵² *Hildreth Granite Co. v. Freeholders of Hudson* (N. J. L.), 100 Atl. 158; *Gregory v. Lewis*, 87 N. J. Eq. 127, 99 Atl. 150; *Riverside Contracting Co. v. New York*,

§ 1956. How lien may be lost.

The method for keeping the lien alive prescribed by the applicable law must be observed.⁵³

§ 1957. Enforcing lien.⁵⁴

As a prerequisite to the enforcement of the lien, substantial compliance with jurisdictional requirements must appear.⁵⁵

§ 1958. Assignment by contractor.⁵⁶

Money deposited in a bank or other place to pay the

218 N. Y. 596, 113 N. E. 564, affirming 150 N. Y. S. 1109, 165 App. Div. 972.

Time of filing. Lehigh Portland Cement Co. v. Poughkeepsie, 166 N. Y. S. 454, 179 App. Div. 368.

Sufficiency. Post & McCord v. New York, 148 N. Y. 568, 86 Misc. Rep. 300; Davis Lumber Co. v. Blanchard, 161 N. Y. S. 474, 175 App. Div. 256.

Failure to file notice of lien within time prescribed will result in the loss of the lien. "The statute under which complainant claims lien expressly provides that the lien shall attach from the time it is filed, and our courts have repeatedly held that this provision, unlike the provisions of the mechanics' lien act, which relates the lien to a prior date, is destructive of the idea of an inchoate lien prior to that time." Mack Mfg. Co. v. Citizens' Constr. Co., 85 N. J. Eq. 331, 96 Atl. 101, affirmed in 86 N. J. L. 254, 98 Atl. 1086.

⁵³ Red Wing Sewer Pipe Co. v. Pierre, 36 S. D. 276, 154 N. W. 712.

Lien is lost if suit is not filed

within the time provided. Red Wing Sewer Pipe Co. v. Pierre, 40 S. D. 42, 166 N. W. 164.

Failure to commence action to foreclose the lien within the time specified in the statute, and failure to file a *lis pendens*, or procure the lien to be kept alive by court order results in the claim ceasing to be a lien upon the fund in question. William Bradley & Son v. Henry Huber Co., 131 N. Y. S. 388, 146 App. Div. 630.

⁵⁴ Texas Co. v. United Paving Co., 81 N. J. Eq. 434, 86 Atl. 436; American Radiator Co. v. New York, 163 N. Y. 324, 177 App. Div. 578; American Metal C. Co. v. New Hyde Park Fire Dist., 154 N. Y. S. 661, 91 Misc. Rep. 236; 159 N. Y. S. 648, 172 App. Div. 774, 158 N. Y. S. 11, 172 App. Div. 763; Red Wing Sewer Pipe Co. v. Pierre, 36 S. D. 276, 154 N. W. 712; National Surety Co. v. American Savings Bank & Trust Co., 101 Wash. 213, 172 Pac. 264.

⁵⁵ Locke v. Cowan (Cal. App.), 168 Pac. 387.

⁵⁶ See § 1922, ante.

Independent School Dist. v. Hall, 159 Iowa 607, 140 N. W. 855;

contractor may be assigned by the contractor to those furnishing materials for the work.⁵⁷ But money retained by the municipality under the contract to pay for labor and materials cannot be assigned by the contractor to obtain money for the work.⁵⁸ Assignment by a contractor of funds on deposit to pay him for the work prior to the filing of liens for materials takes precedence.⁵⁹

It seems well established that a contractor has a right under the lien law to assign moneys to become due, under a contract to a creditor, and that if such creditor files the assignment properly, he obtains a preference over subsequent lienors.⁶⁰

In a late case determined by the United States Supreme Court, the contract between a municipality and a contractor forbade either legal or equitable assignment of any money payable thereunder without the consent of a named municipal board. An assignment made without the specified consent was sustained, (the city making no objection) and it was held prior to the right of a subcontractor who thereafter sought under a statute to sequester the sum so assigned.⁶¹

Texas Co. v. United Paving Co., 81 N. J. Eq. 434, 86 Atl. 436; Gregory v. Lewis, 87 N. J. Eq. 127, 99 Atl. 150; United States Fidelity & Guaranty Co. v. Newark, 76 N. J. Eq. 230, 74 Atl. 192; Standard Sand & Gravel Co. v. New York, 157 N. Y. S. 447, 172 App. Div. 80; New York v. Third National Bank, 221 Fed. 175, 178, 137 C. C. A. 75; American Fidelity Co. v. East Ohio Sewer Pipe Co., 53 Ind. App. 335, 101 N. E. 671.

⁵⁷ Federal Heating Co. v. Buffalo, 163 N. Y. S. 336, 99 Misc. Rep. 121.

⁵⁸ An assignment by the contractor "of his earnings under the contract for which certificates or warrants had not already been is-

sued was necessarily subject to the right of the city to withhold such warrants and certificates and apply the money due the contractor to the payment of the specified class of claims." Boone v. Gary, 162 Iowa 695, 144 N. W. 709.

⁵⁹ Willard Co. v. New York, 142 N. Y. S. 11, 81 Misc. Rep. 48.

⁶⁰ Post & McCord v. New York, 148 N. Y. S. 568, 571, 86 Misc. Rep. 300, relying on Bates v. Salt Springs National Bank, 157 N. Y. 322, 51 N. E. 1033.

⁶¹ Portuguese-American Bank v. Welles, 245 U. S. 7, 61 L. ed. 37 Sup. Ct. 3, reversing 211 Fed. 561, 128 C. C. A. 161, 215 Fed. 81, and distinguishing Burek v. Taylor, 152 U. S. 634.

*e. Bond.***§ 1959. Bond for performance of work.⁶²**

Minor irregularities in the preliminary steps, or in the execution of the bond, will not invalidate it.⁶³ A bond exacted as a condition to payment for a completed improvement, to keep it in repair for a specified time is without consideration and unenforceable.⁶⁴

The contract and bond should be construed together,⁶⁵ and where the bond is statutory, the provisions of the statute are read into such contract and bond.⁶⁶

⁶² *Appalachia v. Mainous* (Va. 1917), 93 S. E. 566.

Bond to run for ten years against defective material or imperfect work may be required. *Newberry v. Detroit*, 184 Mich. 188, 150 N. W. 838.

Guaranty, to keep street in good repair for time named. *St. Louis v. Missouri Granite & Constr. Co.* (Mo. 1916), 185 S. W. 188; *National Surety Co. v. Huntsville*, 192 Ala. 82, 68 So. 373.

See § 1912, ante.

Provided by statute. Courts may not add conditions. *Southern Surety Co. v. National Lumber Co.* (Ind. App. 1919), 122 N. W. 686.

If there is no privity between a materialman and the city, the former cannot sue on a bond given to the city by a contractor. *Eastern Steel Co. v. Globe Indemnity Co.*, 174 N. Y. S. 98.

⁶³ **Irregularities**; as board of education named as payee instead of the state. *Tulsa Rig Reel & Mfg. Co. v. Hausel* (Okla.), 170 Pac. 512.

Private bond, instead of a surety company bond, as contract called for, held valid. *Pease v. Payette*, 26 Idaho 793, 147 Pac. 290.

Bond filed after statutory period,

held a mere irregularity. *Denton v. Carey-Reed Co.*, 169 Ky. 54, 183 S. W. 262.

Bond given after work was completed, but prior to acceptance by the municipality, held valid, as it was given pursuant to a statute, and was not based upon a past consideration. *Griffith v. Stucker*, 91 Kan. 47, 136 Pac. 937.

The contract provided the work should be done under a designated ordinance, whereas the bond referred to fulfillment under another ordinance, held variance not material. *Yost v. Empire State Surety Co.*, 69 Wash. 397, 125 Pac. 167.

⁶⁴ "The rule is well settled that the payment of a valid and admitted debt by the one who owes it is no foundation for a promise by the creditor; that the payment of such a debt is a duty, and no consideration for any promise can be predicated upon its payment. Performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." *Seneca Falls v. Botsch*, 149 N. Y. S. 320, 86 Misc. Rep. 481.

⁶⁵ *Aetna Indemnity Co. v. Indi-*

§ 1960. Bond to secure laborers, materialmen and sub-contractors.⁶⁷

Statutes requiring a contractor to give bond which shall inure to the benefit of all persons who shall per-

anapolis Mortar & Fuel Co., 178 Ind. 70, 98 N. E. 706.

⁶⁶ The bond "in so far as within the statute should receive a construction to effectuate its purpose. In such case the statute itself furnishes a consideration for the conditions thereby imposed." Fry v. Bannon Sewer Pipe Co., 179 Ind. 309, 101 N. E. 10, 12.

⁶⁷ California. Los Angeles Stone Co. v. National Surety Co. (Cal.), 173 Pac. 79, 83; Republic Iron & Steel Co. v. Patillo, 19 Cal. App. 316, 125 Pac. 923; Live Oak Lumber Co. v. Farr, 28 Cal. App. 641, 153 Pac. 741; Live Oak Lumber Co. v. Farr (Cal. App.), 152 Pac. 311.

Iowa. Hay v. Hassett, 174 Iowa 601, 156 N. W. 734.

Indiana. Aetna Indemnity Co. v. Indianapolis Mortar & Fuel Co., 178 Ind. 70, 98 N. E. 706; Aetna Trust & Savings Co. v. Nackenhorst (Ind. 1919), 122 N. E. 421.

Massachusetts. Powers Regulator Co. v. L. W. Taylor & Co., 225 Mass. 292, 114 N. E. 356; Hunter v. Boston, 218 Mass. 535, 106 N. E. 145.

Oklahoma. Dolese Bros. Co. v. Chaney & Rickard, 44 Okla. 745, 145 Pac. 1119, citing § 1960, vol. 4, ante; United States Fidelity & Guaranty Co. v. Star Brick Co. (Okl.), 153 Pac. 1122.

South Carolina. Mack Mfg. Co. v. Massachusetts Bonding Co., 103 S. C. 55, 87 S. E. 439.

Tennessee. Bristol v. Bostwick, 139 Tenn. 304, 202 S. W. 61.

Texas. Fennell v. Trinity Portland Cement Co. (Tex. Civ. App. 1919), 209 S. N. 796.

Washington. Pasco v. Pacific Coast Casualty Co., 101 Wash. 496, 172 Pac. 566.

United States. New Amsterdam Casualty Co. v. Astoria, 256 Fed. 560.

Statute providing for a bond to secure payment for labor and material, held inapplicable to a city having a freeholders' charter which provided a plan for doing public work. Loof Lumber Co. v. Van Loben Sels, 173 Cal. 228, 159 Pac. 600, followed in Williams v. Vallejo (Cal. App. 1918), 171 Pac. 834.

Bond to secure payment for material, not sufficient in form to be a statutory bond was treated as a common law bond. Fellows v. Krentz, 189 Mo. App. 547, 176 S. W. 1080.

Bond to be construed in light of statute, charter and ordinance. St. Louis v. Hill-O'Meara Constr. Co., 175 Mo. App. 555, 561, 158 S. W. 98.

Inures to benefit of contractor's assignee. Hub Hardward Co. v. Aetna Accident & Liability Co., 178 Cal. 264, 173 Pac. 81.

Materialman may sue on. St. Louis v. McCully Const. Co. (Mo. App. 1916), 184 S. W. 939.

Suit by city at relation of materialmen so provided in bond, held

form labor on or furnish materials to be used on the

valid. *St. Louis v. Parker-Washington Co.*, 271 Mo. 229, 196 S. W. 767, certiorari denied *Parker-Washington Co. v. St. Louis*, 245 U. S. 651, 38 Sup. Ct. R. 11, 62 L. ed. 531.

Bond secures materialmen and laborers of subcontractor. *Griffith v. Stucker*, 91 Kan. 47, 136 Pac. 937.

A bond required by the statute runs to those who furnish labor or material to a contractor, but such bond does not run to a subcontractor. *Fry v. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10, 12.

"It is well settled in this jurisdiction that where a contractor's bond expressly obligates the signers thereof to pay for the material and labor entering into the construction called for by the principal contract those furnishing material on, or bestowing labor upon, such construction may maintain an action therefor against the sureties on the bond." *Builders' Lumber & Supply Co. v. Chicago Bonding & Surety Co.*, 167 Wis. 167, 166 N. W. 320.

Right of laborer to sue surety for compensation for work on a public improvement, denied. "The bond runs to the people of the state. In order that a third person may maintain an action, there must be a liability to him on the part of the promisee. The people of the state are not liable for the payment of the wages earned by the plaintiff as a laborer working under a contract in the improvement of the highway. The plaintiff has no right of action against the state, nor can he make a claim against the

fund of the state appropriated for the improvement of this highway for the payment of the wages due him, save the making of a claim under the unexpended fund in accordance with the provision of the lien law." *Fosmire v. National Surety Co.*, 171 N. Y. S. 474, 104 Misc. Rep. 166.

Right of materialman to recover cannot be defeated because of a non-warranted extension as to the completion of the work. "The covenant in the bond should be read in the light of the statute, the purpose of which was to protect those who furnish labor and materials for work described in the contract, and not the particular engagements under which the work is done." *Los Angeles Stone Co. v. National Surety Co. (Cal.)*, 173 Pac. 79, 83.

Equity may entertain a suit of a materialman relating to four distinct contracts on the bond in event of insolvency of the contractor and where the rights of various creditors are involved, where the materials were not apportioned to the several improvements, thus presenting much complexity requiring an accounting. *Dewey Portland Cement Co. v. Texas Building Co.*, 234 Fed. 622, 148 C. C. A. 388.

"It has frequently been held that that the purpose of requiring bonds such as this, on contracts for the erection of public buildings, is to afford those furnishing material and labor on public work, which cannot be subject to mechanics' lien the same measure of protection as is afforded by the me-

improvement, have been held constitutional, since this is a public purpose.⁶⁸ A bond for the faithful performance of the work merely does not inure to the benefit of materialmen and laborers.⁶⁹

A covenant for the payment of materials is independent of the covenant to protect the city as the covenant for the faithful performance of the contract.⁷⁰

§ 1961. Liability on bond.⁷¹

“The liability of sureties is to be determined by the

chanics' lien law where the building or improvement is not of a public character.” *St. Louis v. Hill-O'Meara Const. Co.*, 175 Mo. App. 555, 158 S. W. 98, 100.

Material is measured by its value, not its selling price. *Panama Commercial Co. v. Tingey*, 26 Cal. App. 576, 147 Pac. 585.

Subcontractor may sue on bond. *Schefflow v. Pierce* (N. C.), 97 S. E. 167.

Subcontractor protected by the bond. *Philadelphia v. Fidelity & Deposit Co.*, 46 Pa. Super. Ct. 313; *Streator Clay Mfg. Co. v. Henning-Vineyard Co.*, 175 Ga. 297, 155 N. W. 1001.

⁶⁸ *Barber Asphalt Paving Co. v. Bancroft*, 167 Cal. 185, 138 Pac. 742, 745, distinguishing *Gibbs v. Tally*, 133 Cal. 374, 65 Pac. 970, 60 L. R. A. 815.

⁶⁹ *Wilson v. Nelson* (Okl.), 153 Pac. 1179.

⁷⁰ *Fry v. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10, 12.

Bond made for benefit of materialmen and laborers may be sued on by them. *Snider v. Greer-Wilkinson Lumber Co.*, 51 Ind. App. 348, 96 N. E. 960.

Absence of an agreement in the

bond to furnish and pay for materials and labor upon the part of the contractor so as to make the contract inure to the benefit of laborers and materialmen will not protect such persons. *Staples-Hildrebrand Co. v. Metal Concrete Chimney Co.* (Ind. App.), 112 N. E. 832.

One who furnishes material may sue on bond given to secure payment of, if the contract so provides. *Fellows v. Kreutz*, 189 Mo. App. 547, 176 S. W. 1080.

“A contract may be entered into by two or more persons for the primary benefit of third persons, not parties to the contract, and in such a case, the persons for whose benefit the contract is made may maintain an action upon it in their own names.” *Snider v. Greer-Wilkinson Lumber Co.*, 51 Ind. App. 348, 96 N. E. 960.

⁷¹ *California. Live Oak Lumber Co. v. Farr*, 28 Cal. App. 641, 153 Pac. 741.

Idaho. Boise City v. National Surety Co., 30 Idaho 455, 165 Pac. 1131.

Iowa. Streator Clay Mfg. Co. v. Henning-Vineyard Co., 176 Iowa 297, 155 N. W. 1001.

specified conditions of the bond, and their liability can-

Kansas. Board of County Commissioners v. United States Fidelity & Guaranty Co., 26 Kan. 255, 150 Pac. 590.

Kentucky. National Surety Co. v. Louisville, 165 Ky. 38, 176 S. W. 364.

Massachusetts. Hunter v. Boston, 218 Mass. 535, 106 N. E. 145.

Michigan. Flint v. Chicago Bonding & Surety Co., 202 Mich. 438, 168 N. W. 528.

New York. New York v. De Marco, 151 N. Y. S. 554, 166 App. Div. 35.

Oklahoma. United States Fidelity & Guaranty Co. v. Star Brick Co., 54 Okla. 103, 153 Pac. 1122.

Oregon. Bay City v. Sandberg, 83 Or. 268, 163 Pac. 444.

Washington. City Retail Lumber Co. v. Title Guaranty & Surety Co., 72 Wash. 300, 130 Pac. 345; Aberdeen v. Equitable Surety Co., 92 Wash. 440, 159 Pac. 683; Northwestern National Bank v. Guardian Casualty & Guaranty Co., 93 Wash. 635, 161 Pac. 473; Title Guaranty & Surety Co. v. First National Bank, 94 Wash. 55, 162 Pac. 23; Pearson v. Puget Sound Machinery Depot, 99 Wash. 596, 169 Pac. 961; Maryland Casualty Co. v. Hill, 100 Wash. 289, 170 Pac. 594.

Defective work and defective material as breach. Baltimore v. Maryland Pavement Co., 130 Md. 454, 100 Atl. 770.

Where the principal in the bond obligates himself to hold the obligee harmless and to pay as and when required by law the special taxes levied by the public corporation against the property for the

improvement, the obligation constitutes a promise to pay the special taxes when due and thus discharges the obligee. An obligation of this character is not a contract of indemnity under which damages must be sustained before recovery can be had, but an affirmative covenant on which a right of action accrues on failure to pay. Delmar Investment Co. v. Lewis, 271 Mo. 317, 322, 196 S. W. 1137.

Right of action on bond covering damages which may result from the carelessness of the contractor by an employee of the contract, due to carelessness, denied. Stanekiewicz v. Prange, 167 Wis. 607, 167 N. W. 436.

The limitation clause affects the remedy and not the right of action. American Steel & Wire Co. v. Southern Surety Co., 161 N. Y. S. 434, 97 Misc. Rep. 271.

Preliminary steps. Claimant for labor and material required to file sworn statement of claim within a specified time after the completion of the work, as a condition. Powers Regulator Co. v. L. W. Taylor & Co., 225 Mass. 292, 114 N. E. 356.

Notice to be filed within specified time from the completion of the improvement, duly verified, also with a statement. Failure to file will not sustain action. San Dimas Quarry Co. v. American Surety Co., 30 Cal. App. 3, 157 Pac. 548.

Notice of materialman to city, held insufficient. Carstens Packing Co. v. Empire State Surety Co., 84 Wash. 345, 147 Pac. 36.

Guaranty bond. Ottumwa v. McCarthy Improvement Co. (Iowa

not be enlarged beyond such specified conditions."⁷²

The obligations of sureties should not be extended beyond their undertaking under the statute; "but within that undertaking a liberal interpretation is indulged in favor of the materialman and laborer."⁷³

§ 1962. Same—for what liable.

In actions on bonds conditioned for the faithful performance of the contract what items should be included under the decisions depends upon the terms of the contract involved.⁷⁴

1915), 150 N. W. 586, modified in 175 Iowa 233, 154 N. W. 306.

Breach for failure to maintain pavement, in good condition, for the specified time after completion and acceptance. *Baltimore v. Maryland Pavement Co.*, 130 Md. 454, 100 Atl. 770.

Assignee of contract, held could not maintain action on the bond of the contract for labor and material. *Philadelphia v. Neill*, 235 Pa. 117, 83 Atl. 575.

Right of surety to subrogation denied because of laches. *American Fidelity Co. v. East Ohio Sewer Pipe Co.*, 53 Ind. App. 335, 101 N. E. 671, 673.

⁷² *Hay v. Hassett*, 174 Iowa 601, 156 N. W. 734.

⁷³ *Fry v. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10, 13.

⁷⁴ **Supplies, materials and laborers.** Failure to pay for material, as pipe, furnished is clearly a default of the principal for which, of course, the sureties are liable. *Fry v. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10, 13.

Food supplies to men employed on the work, held not included under particular contract. *Mitchell*

v. Berlin-McNitt Co., 91 Wash. 582, 158 Pac. 264, distinguishing *Baker City Mercantile Co. v. Idaho Glazed Cement Pipe Co.*, 67 Or. 372, 136 Pac. 23.

"Provisions and supplies" include rentals for an engine employed in the improvement. *National Lumber Co. v. Title Guaranty & Surety Co.*, 85 Wash. 660, 149 Pac. 16.

Does not include trenching machines, as they are not "labor and material furnished," etc. *Southern Surety Co. v. Municipal Excavator Co. (Okl.)*, 160 Pac. 617.

To secure the payment of "supplies" in the performance of the work, held to include rental of hoist derrick and pump, rented to the contractor. *Hurley-Mason Co. v. American Bonding Co.*, 79 Wash. 564, 140 Pac. 575.

Appliance as tubing, not "materials" or "supplies." *Sherman v. American Surety Co. (Cal.)*, 173 Pac. 161.

Relating to right to lien under a statute, "material," held not to include rent for a steam shovel leased to a contractor. *Troy Public Works Co. v. Yonkers*, 207 N.

Often supplies as well as material and labor are included, but machinery used in the prosecution of the work and repairs thereof are not always included.⁷⁵ The recoverable items are not limited to lienable items, but the purchase price of all material furnished may be recovered, whether lienable or not, if they were necessary to complete the contract.⁷⁶

§ 1963. Same—on abandonment of work.

Under particular contract it was held there was no liability for engineering services prior to the time the municipality took over and completed the work.⁷⁷

§ 1964. Same—personal liability of officers.

Neglect to require a contractor of public work to provide bond to protect materialmen and laborers, when imperatively required by law, is held by some courts to create liability for damages in behalf of those injured by reason of such omission. Decisions on such liability

Y. 81, 100 N. E. 700, 44 L. R. A. (N. S.) 311.

The supply of coal as fuel, held not covered. *Alpena v. Title Guaranty & Surety Co.*, 168 Mich. 350, 134 N. W. 23.

Coal to operate machinery to do the work, held material used in the performance of the contract under a particular law designed to protect laborers and those who supplied materials. *Pittsburg Coal Co. v. Southern Asphalt & Const. Co.*, 138 Tenn. 154, 196 S. W. 490.

Lumber furnished included. *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124.

Debt "incurred in the performance of the work." Money loaned to contractor for the purpose of paying debts incurred in the mak-

ing of the improvement, and such as was so used, held included. *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, 702.

⁷⁵ Trenching machinery, held not included. *Southern Surety Co. v. Municipal Excavator Co.* (Okl.), 160 Pac. 617.

Repairs of rented steam shovel, held not included. *Standard Boiler Works v. National Surety Co.*, 71 Wash. 28, 127 Pac. 573.

⁷⁶ *Mitchell v. Berlin-McNitt Co.*, 91 Wash. 582, 158 Pac. 264, approving *United States v. Aetna Indemnity Co.*, 40 Wash. 87, 82 Pac. 171; and *Zipp v. Fidelity & Deposit Co.*, 76 N. Y. S. 386, 73 App. Div. 20.

⁷⁷ *Council v. United States Fidelity & Guaranty Co.*, 31 Idaho 629, 175 Pac. 44.

are the result, of course, of the construction of the particular statutes involved.⁷⁸

§ 1965. Defenses.⁷⁹

A change in a statute modifying the remedy but not interfering with the obligation will not discharge the surety.⁸⁰

Nor will the assignment of the contract by the contractor.⁸¹

So an agreement among contractors which did not reach the point or have the effect of an novation will not affect the liability of the surety.⁸²

⁷⁸ Evens & Howard Fire Brick Co. v. Gammon (Mo. App.), 204 S. W. 832; Burton Machinery Co. v. Ruth, 194 Mo. App. 194, 186 S. W. 737, 196 Mo. App. 459, 194 S. W. 526; State ex rel. v. Miller, 123 Mo. App. 730, 733, 101 S. W. 616; Hydraulic Press Brick Co. v. School District, 79 Mo. App. 665; Plummer v. Kennedy, 72 Mich. 295, 40 N. W. 433; Owen v. Hill, 67 Mich. 43, 34 N. W. 649; Wilcox Lumber Co. v. School District, 106 Minn. 208, 118 N. W. 794; Monnier v. Godbold, 116 La. 165, 40 So. 604, 5 L. R. A. (N. S.) 463; Rhea County v. Sneed, 105 Tenn. 581, 56 S. W. 1063.

⁷⁹ Hub Hardware Co. v. Aetna Accident & Liability Co. (Cal.), 173 Pac. 81; St. Louis v. Hill-O'Meara Const. Co., 175 Mo. App. 555, 158 S. W. 98; New York v. Ceeley-Taylor Co., 133 N. Y. S. 808, 149 App. Div. 98.

Invalidity of contract. Hutchinson v. Kansas Bitulithic Co., 239 Fed. 659, 152 C. C. A. 493.

Illegality of contract is not a defense. Tulsa Rig Rell & Mfg. Co. v. Hansel (Okl.), 170 Pac. 612.

Provision relating to attorneys' fees, held valid. Snider v. Greer-Wilkinson Lumber Co., 51 Ind. App. 348, 96 N. E. 960.

Alteration in material does not discharge surety. W. D. Casualty Co. v. Wellston (Okl.), 148 Pac. 691.

Certain defenses are available to city only, and not to contractor's sureties, e. g., that a municipal officer was interested in the contract in violation of law under a charter provision declaring such contract "void and of no force or effect against the city." People v. Southern Surety Co., 199 Mich. 30, 165 N. W. 769; Schurtz v. Grand Rapids, 199 Mich. 20, 165 N. W. 766.

⁸⁰ American Radiator Co. v. American Bonding Co., 27 Cal. App. 685, 151 Pac. 168.

⁸¹ Los Angeles Stone Co. v. National Surety Co. (Cal.), 173 Pac. 79.

⁸² American Radiator Co. v. American Bonding Co., 27 Cal. App. 685, 151 Pac. 168.

The fact that the contractor made payments on account to a materialman and subsequently executed a time notice for the balance without the knowledge of the surety, it was held, did not discharge the surety.⁸³

And the payment by the municipality for the work accepted by it under an honest belief that it was done in the manner required by the contract, it was held, did not release the surety.⁸⁴

But the working of employees on the contract more than eight hours a day, in violation of a labor law, with the city's consent, is a good defense on the surety bond.⁸⁵

Alterations in the contract to be material must change the legal effect.⁸⁶

Thus a material change relating to payments made after the execution of the contract and bond operates to discharge the surety.⁸⁷

The extension of time of payment by the principal and creditor, without consent of the surety, usually discharges a surety, but the rule was held not applicable to a paid surety company, unless resultant harm appears.⁸⁸

"Usually a written instrument for the payment of money imports a consideration, and the defense of lack of consideration cannot be raised by demurrer, but must be set up by answer." "This doctrine is based upon a presumption that the instrument was given for value, but when it affirmatively appears from the complaint that the instrument was without valid consideration, no such presumption exists. The contract, then, is pleaded

⁸³ *People v. Bowen*, 187 Mich. 257, 153 N. W. 672.

⁸⁴ *Seaside v. Rendles* (Or. 1919), 180 Pac. 319, 326, approving *Newark v. New Jersey Asphalt Co.*, 68 N. J. L. 453, 53 Atl. 294, 296.

⁸⁵ *Medina v. Title Guaranty & S. Co.*, 136 N. Y. S. 786, 152 App. Div. 307.

⁸⁶ *Fry v. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10.

⁸⁷ *American Metal Ceiling Co. v. New Hyde Park Fire Dist.*, 154 N. Y. S. 661, 665, 91 Misc. Rep. 236.

⁸⁸ *Standard Salt & Cement Co. v. National Surety Co.*, 134 Minn. 121, 158 N. W. 802, 804, 805.

Extension of time as discharging surety. *Chester v. National Surety Co.*, 91 S. C. 17, 74 S. E. 37.

as a mere naked promise which does not constitute a cause of action, and a demurrer will lie.”⁸⁹

§ 1966. Construction.⁹⁰

“The language of the bond is to be interpreted in the light of the statute and ordinance, and with a view to effectuating the legislative intent manifested in these enactments.”⁹¹

“The intent of the parties is to be gathered from the nature of the instrument fairly read in the light of all the circumstances attending its making and the apparent purpose it was intended to serve.”⁹²

The bond and contract are to be construed together.⁹³

The general rule is that the bond is to be construed strictly against the surety.⁹⁴

“The rule of construction applicable to the contract of a gratuitous surety, always so much the favorite of courts that every intendment is in his favor, does not apply when the surety is a paid surety. Their undertakings are in the nature of insurance contract. * * * Our cases reflect the holdings of other courts. The unmistakable trend is as stated and the result is wholesome.”⁹⁵

⁸⁹ Seneca Falls v. Botsch, 149 N. Y. S. 320, 86 Misc. Rep. 481.

⁹⁰ National Surety Co. v. Huntsville, 192 Ala. 82, 68 So. 373.

Bond given as a statutory bond will not be treated as a common law bond. San Dimas Quarry Co. v. American Surety Co., 30 Cal. App. 3, 157 Pac. 548.

⁹¹ St. Louis v. Hill-O'Meara Const. Co., 175 Mo. App. 555, 158 S. W. 98, 100.

⁹² Hay v. Hassett, 174 Iowa 601, 156 N. W. 734.

⁹³ Builders' Lumber & Supply Co. v. Chicago Bonding & Surety Co., 167 Wis. 167, 166 N. W. 320; Staples-Hilderbrand Co. v. Metal

Concrete Chimney Co. (Ind. App.), 112 N. E. 832.

⁹⁴ Topeka v. Federal Union Surety Co., 213 Fed. 958, 130 C. C. A. 364.

⁹⁵ Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802, 804.

See notes 33 L. R. A. (N. S.) 513; Ann. Cas. 1912B, 1085; 13 Mich. Law Rev. 245; 29 Harvard Law Rev. 314; 3 Cal. Law Rev. 169.

“In bonds of the kind here involved which are executed upon a consideration and by a corporation organized to make such bonds for profit, the rule relating to ordinary

V. DAMAGES.

§ 1968. Liability for consequential damages.⁹⁶

Apart from imposition by written law, negligence, want of skill, or active wrong-doing, no municipal liability arises for consequential damages resulting from the construction of public improvements,⁹⁷ including the construction of streets,⁹⁸ and sewers.⁹⁹

sureties not applicable and any doubtful language should be construed most strongly against the surety and in favor of the indemnity which the assured had reasonable grounds to expect. The rule applicable to contracts of fire and life insurance is the rule, by analogy, most applicable to such a contract." *Philadelphia v. Fidelity & Deposit Co.*, 46 Pa. Super. Ct. 313, 317, 318.

⁹⁶ See §§ 2634, 2635, post; §§ 2634, 2635, vol. 6, ante; Chapter 58, Municipal liability for torts.

⁹⁷ Connecticut. *Gaylor v. Bridgeport*, 90 Conn. 235, 96 Atl. 936.

Georgia. *Atlanta v. Williams*, 15 Ga. App. 654, 84 S. E. 139.

Louisiana. *Shreport v. McClure*, 132 La. 468, 61 So. 530.

Missouri. *Campbell Lumber Co. v. Levee Dist.*, 186 Mo. App. 371, 380, 172 S. W. 64; *Melvin v. Mound City*, 185 Mo. App. 522, 172 S. W. 482 (holding amount is jury question).

North Carolina. *Stiles v. Franklin*, 173 N. C. 651, 92 S. E. 599; *Wood v. Duke Land & Imp. Co.*, 165 N. C. 367, 81 S. E. 422.

New York. *Goodrich v. Otego*, 145 N. Y. S. 497, 160 App. Div. 349.

Oklahoma. *Mangum v. Todd*, 42 Okla. 343, 141 Pac. 266.

Washington. *Thorpe v. Spokane*, 78 Wash. 488, 139 Pac. 221; *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820.

No liability arises where the city attempts to make improvements beyond the scope of its authority. *Duckworth v. Springfield*, 194 Mo. App. 51, 184 S. W. 476.

There is municipal liability where the injury is the result of active wrongdoing chargeable to the corporation. *Doran v. Asbury*, 91 N. J. L. 651, 104 Atl. 130, following *Kehoe v. Rutherford*, 74 N. J. L. 659, 65 Atl. 1046, 122 Am. St. Rep. 411.

Liable for negligence in doing work. *Cincinnati v. Filser*, 2 Ohio App. 394, 35 Ohio Cir. Ct. R. 487; *Pacific Laundry Co. v. Pacific Bridge Co.*, 69 Or. 306, 138 Pac. 221.

In blasting under proper precautions, creates no liability to abutting residents, due to noise. *Kugel v. Sterling*, 164 Ill. App. 371.

⁹⁸ "A municipal corporation is not liable for its failure to make a municipal improvement; nor is it liable for consequential damages to the owners or occupants of property abutting on a street which it opens and obstructs in making a municipal improvement for which it has legislative authority." *Cassel v. New York*,

True, liability arises where there has been an actual taking or damaging that is not consequent upon the exercise of reasonable care in the doing of the work.¹

In Washington a city is held liable for the removal of lateral support to property near a street, in making an original grade, where it was negligent in leaving a clay bank exposed and unprotected, knowing or being

153 N. Y. S. 410, 417, 418, 167 App. Div. 831.

"This court has held in common with the majority of the courts in this country that the individual is bound by the interest and purpose of the original dedicator, and that an abutting owner can not claim damages resulting from an original grade." *Stern v. Spokane*, 73 Wash. 118, 131 Pac. 476.

"The dedication of streets and alleys to the public use implies an agreement of the dedicator and his successor in interest that the city may establish grades and improve streets thereto in aid of such use." *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859.

99 "A municipal corporation can not be held liable for consequential injuries that result from the construction of public works in the absence of negligence or want of due care or skill, and this includes the construction, maintenance, and operation of sewers and streets." *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N. E. 387, 389.

"Where there is no negligence, no liability arises. * * * This doctrine is almost universally accepted by the state courts of this country. * * * The remedy, therefore, for a consequential injury resulting from the state's ac-

tion through its agents, if there be any, must be that, and that only, the legislature shall give. It does not exist at common law. * * * But when negligence exists in doing the municipal work the rule is otherwise, and the corporation becomes liable for damages." *Hoyle v. Hickory*, 167 N. C. 619, 621, 83 S. E. 738, citing § 1968, p. 4220, vol. 4, ante.

1 "It is the duty of a city to maintain streets and bridges, and such inconveniences as necessarily follow the performance of that duty are a burden the property owners must bear. * * * It is only where there has been an 'actual taking or a damaging that is not consequent upon the exercise of reasonable care, in the performance of the work that the city will be held liable. Of course, the city would be liable for any damage resulting from a physical invasion of the 'property beyond the street line, or a physical projection of the instrumentalities used to carry on the work over the adjoining property. If it should appear that the owner will suffer such damage he may restrain the prosecution of the work, or he may permit it to go on, claiming his damages in an action at law." *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478.

charged with knowledge that it would result in disintegration of the bank and the consequent sliding of the soil.²

But in that State a city is not liable to abutting owners for the removal of lateral support in making an original grade of a dedicated street, where the grading is done wholly within the limits of the street. The reason for the rule is found in variant expressions of the controlling principle that the right to make an original grade is implied in the grant of dedication and that the abutting property owner holds subject to this right whenever the city may see fit to exercise it.³

§ 1968a. Same—delay in doing the work.

Judicial decisions have considered whether municipal liability would arise from unreasonable delay, due wholly or in part to the public authorities, which resulted in unreasonable obstruction of public ways to the special injury of abutting property owners.⁴ A late New York case, in the opinion of the author, outlines a reasonable rule in which it is said that it is the "duty of a municipal corporation in exercising its legislative authority to make improvements requiring the obstruction of streets, to use reasonable care and diligence to the end that the street shall not be unnecessarily obstructed and that necessary obstructions shall not be continued beyond the time reasonably required for making the improvement. * * * If the city be not liable for consequential damages, from unreasonable delay in the prosecution of a public improvement in any circumstance, then it may completely obstruct a street and abandon work on the improvement indefinitely, and abutting shopkeepers would have no redress. I am of opinion that the extent of immunity of a municipal corporation from

² *Lochore v. Seattle*, 98 Wash. 265, 167 Pac. 918; *Allbin v. Seattle*, 98 Wash. 275, 167 Pac. 922.

³ *Schuss v. Chehalis*, 82 Wash. 595, 144 Pac. 916; *Best v. Chehalis*, 82 Wash. 601, 144 Pac. 918; *Flet-*

cher v. Seattle, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843.

⁴ Delay, due to injunction. *Williams v. Seattle*, 78 Wash. 377, 139 Pac. 45.

liability from obstructing streets in making public improvements is for the period reasonably necessary for the performance of the work, with immunity also from liability for errors of judgment with respect to the period required for the performance of the work, and from liability for delays caused by contractors without its fault.”⁵

§ 1969. Constitutional provisions.⁶

§ 1970. Statutory and charter provisions.⁷

§ 1972. Authorization or ratification of improvement by municipality.⁸

⁵ Cassel v. New York, 153 N. Y. S. 410, 417, 418, 167 App. Div. 831.

⁶ Ray v. Huntington, 81 W. Va. 607, 95 S. E. 23.

Change of grade is “damaging” within the constitution, and the right to damages cannot be abridged by statute or ordinance. Hollenbeck v. Seattle, 88 Wash. 322, 153 Pac. 18.

Initial grade of street damaging property of an abutting owner renders the city liable by virtue of the constitution prohibiting the taking or damaging private property without compensation. Richards v. Salt Lake City, 49 Utah 28, 161 Pac. 680.

Consequential damages from change of grade of street, held not within constitutional provisions that private property shall not be taken or damaged, until paid, etc. McGrew v. Granite Bituminous P. Co., 247 Mo. 549, 155 S. W. 411.

⁷ Otis Elevator Co. v. Chicago, 263 Ill. 419, 105 N. E. 338, 52 L. R. A. (N. S.) 192; Re Harrison Estate, 250 Pa. 129, 95 Atl. 406.

⁸ City must authorize the work,

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to create municipal liability. Hicks v. Williamsport, 235 Pa. 509, 84 Atl. 435.

Must authorize or ratify, otherwise there is no liability. Jones v. Caruthersville, 186 Mo. App. 404, 407, 171 S. W. 639.

Change of street grade. McGraw v. Granite Bituminous Paving Co., 247 Mo. 549, 155 S. W. 411; Ketchum v. Monett, 193 Mo. App. 529, 533, 181 S. W. 1064; Bigelow v. Springfield, 178 Mo. App. 463, 162 S. W. 750; Heidorn v. Kirkwood, 169 Mo. App. 156, 152 S. W. 374.

Change of grade can only be by ordinance, and without it city is not liable. Johnson v. Granvill, 36 N. D. 91, 161 N. W. 721.

“It does not appear that the town ever took any action with respect to the gutter, the culvert or the catch-basin; and no vote specially authorizing their installation appears in the town records.

* * * The town did not assume to perform the work by means of its agents, as in Waldron v. Haverhill, 143 Mass. 582, 10 N. E. 481;

§ 1974. Agreement fixing amount of damages.⁹

§ 1975. Damages for change of street grade.

As there is no municipal liability at common law for damage to abutting property due to an authorized change in the grade of a street, made in a proper manner, without negligence,¹⁰ liability exists only by virtue of constitution, statute or charter.¹¹

Butman v. Newton, 179 Mass. 1, 60 N. E. 401, 88 Am. St. Rep. 439."

Blaisdell v. Stoneham, 229 Mass. 563, 118 N. E. 919.

Construction of sidewalk; question of authority. Ketchum v. Monett, 193 Mo. App. 529, 181 S. W. 1064.

⁹ Otis Elevator Co. v. Chicago, 263 Ill. 419, 105 N. E. 338, 52 L. R. A. (N. S.) 192.

¹⁰ Kentucky. Philpot v. Tompkinsville, 148 Ky. 511, 146 S. W. 1093.

Louisiana. Connell v. Yazoo & M. V. R. Co., 141 La. 701, 75 So. 652.

Maryland. Baltimore & O. R. Co. v. Kahl, 124 Md. 299, 92 Atl. 770; Baltimore & O. R. Co. v. Kane, 124 Md. 231, 92 Atl. 532.

New York. Friel v. New York, 134 N. Y. S. 1025, 150 App. Div. 317; People ex rel. v. Hennessy, 131 N. Y. S. 327, 146 App. Div. 440; People ex rel. v. Ormond, 168 N. Y. S. 255, 181 App. Div. 242; People ex rel. v. Hennessy, 205 N. Y. 301, 98 N. E. 516; Re Grant Ave., New York City, 152 N. Y. S. 13; Goodrich v. Otego, 216 N. Y. 112, 110 N. E. 162.

North Carolina. J. A. & C. E. Bennett v. Winston-Salem South Bound Ry. Co., 170 N. C. 389, 87 S. E. 133; Wood v. Duke Land &

Imp. Co., 165 N. C. 367, 81 S. E. 422, citing § 1975, vol. 4, ante.

South Carolina. Stone v. Greenville (S. C. 1918), 96 S. E. 520.

Vermont. Hoyt v. North Troy (Vt. 1918), 105 Atl. 33.

Wisconsin. Henry v. LaCrosse, 165 Wis. 625, 162 N. W. 174, 176.

"In the absence of statutory authority therefor, no action would lie if the grade had been lawfully changed. The wrong is deemed *damnum absque injuria*." Kehres v. New York, 147 N. Y. S. 825, 827, 162 App. Div. 349.

Changing grade of an old highway in territory annexed creates no municipal liability. Gernert v. Louisville, 155 Ky. 589, 159 S. W. 1163.

"It is a well recognized rule with us that an abutting owner may not as a rule recover damages for diminution in the value of his property, caused by a duly authorized change in the grade of a street, which has been already established. * * * The position is allowed to prevail on the supposition that the municipal authorities shall not proceed or have the work done in an unskillful or negligent manner, and where it is shown that there has been a breach of duty in this respect an action lies." Earnhardt v. Lexington,

But a change of grade without lawful authority renders the municipality liable for damages resulting therefrom to an abutting owner whose property had been improved with relation to a former legally established grade.¹²

§ 1976. Same—created by constitution, statute or charter.

The right to damages for change of grade of street created by constitution, statute or charter is made dependent upon specified conditions.¹³

157 N. C. 234, 72 S. E. 864; Harper v. Lenoir, 152 N. C. 723, 68 N. E. 228; Jones v. Henderson, 147 N. C. 120, 60 S. E. 894.

Construction of sidewalk. Heidorn v. Kirkwood, 169 Mo. App. 156, 152 S. W. 374; Kirksville v. Ferguson, 262 Mo. 661, 172 S. W. 4.

¹¹ Section 1976, post.

¹² Kehres v. New York, 147 N. Y. S. 825, 162 App. Div. 349; Friel v. New York, 134 N. Y. S. 1025, 150 App. Div. 317, affirmed 208 N. Y. 555, 101 N. E. 1103.

Liability for changing an established grade where property has been improved with reference to such grade. Mangum v. Todd, 42 Okla. 343, 141 Pac. 266.

Unless property owner builds with reference to grade, on change, he cannot recover damages. Vilas v. Chicago, M. & St. P. Ry. Co., 179 Iowa 1244, 162 N. W. 795.

¹³ Arkansas. Eickhoff v. Argenta, 120 Ark. 212, 175 S. W. 367.

Connecticut. Rogers v. New London, 89 Conn. 344, 94 Atl. 364.

Georgia. Williamson v. Savannah, 19 Ga. App. 784, 92 S. E. 291; Atlanta v. Atlas Realty Co., 17 Ga. App. 426, 87 S. E. 698.

Iowa. Chiesa v. Des Moines, 158

Iowa 343, 138 N. W. 922; Landis v. Marion, 176 Iowa 240, 157 N. W. 480, 178 Iowa 1396, 161 N. W. 26.

Kentucky. Louisville v. Kosheva, 161 Ky. 359, 170 S. W. 964; Louisville v. Lansberg, 161 Ky. 361, 170 S. W. 962.

Missouri. Ford v. Phillips, 159 Mo. App. 482, 486, 141 S. W. 907; White v. Springfield, 189 Mo. App. 228, 233. Berglar v. University City (Mo. App.), 190 S. W. 620; Medley v. Jackson (Mo. App.), 200 S. W. 676.

Maine. Sherburne v. Sanford, 113 Me. 66, 92 Atl. 997; Turner v. Portland, 114 Me. 454, 96 Atl. 742.

Michigan. Labadie v. Ford, 185 Mich. 402, 151 N. W. 1046.

Nebraska. Stocking v. Lincoln, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. (U. S.) 107.

New York. Re Cauldwell, 141 N. Y. S. 734, 156 App. Div. 661; Goodrich v. Otego, 216 N. Y. 112, 110 N. E. 162; Re Grant Ave., New York City, 152 N. Y. S. 13; People ex rel. v. Prendergast, 135 N. Y. S. 705, 150 App. Div. 665; People ex rel. v. Hennessy, 205 N. Y. 301, 98 N. E. 516, reversing 131 N. Y. S. 327, 146 App. Div. 440;

§ 1977. Change of grade must be of a grade legally established.¹⁴

As a prerequisite to damages due to change of a street grade, it is frequently stated that the prior grade must

People ex rel. v. Hennessy, 134 N. Y. S. 145, 74 Misc. Rep. 166; *Rogers v. Cato*, 177 N. Y. S. 470.

New Jersey. *Worth v. Westfield* (N. J. L.), 90 Atl. 727.

Oklahoma. *Mangum v. Todd*, 44 Okla. 343, 141 Pac. 266.

Pennsylvania. *Iron City Automobile Co. v. Pittsburgh*, 253 Pa. 478, 98 Atl. 679; *Maxler v. Freeport Borough*, 48 Pa. Super. Ct. 146.

South Carolina. *Stone v. Greenville* (S. C.), 96 S. E. 520.

Wisconsin. *Burnham v. Milwaukee*, 155 Wis. 90, 143 N. W. 1067; *Pabst Brewing Co. v. Milwaukee*, 148 Wis. 582, 133 N. W. 1112.

When authorized by the municipality, change of grade gives abutting property owners resulting damages. *Re Leonard Street*, 162 N. Y. S. 285, 176 App. Div. 25.

By statute "an adjoining owner is given a remedy against the village for an injury caused by a change of grade not made by the village itself." *McMullen v. Marlborough*, 148 N. Y. S. 505, 163 App. Div. 73.

Charter of New York City construed as to authority conferred on municipal officers to change streets or the grade of streets. Courts will not interfere with discretion. *McCabe v. New York*, 213 N. Y. 468, 107 N. E. 1049, affirming 140 N. Y. S. 127, 155 App. Div. 262.

Ordinance may create municipal

liability for change of street grade necessitating relaying mains and water pipes of water company. *Bismarck Water Supply Co. v. Bismarck*, 23 N. D. 352, 137 N. W. 34.

In Tennessee the court has adopted the rule that a liberal construction shall be given to such statutes in favor of the rights of citizens affected. *Knoxville v. Barton*, 128 Tenn. 177, 159 S. W. 837; *Knoxville v. Harth*, 105 Tenn. 436, 58 S. W. 650, 80 Am. St. Rep. 901.

Damages recoverable for injury to vacant lot. *Staub v. Mamaronck*, 151 N. Y. S. 485, 165 App. Div. 755, disapproving *Lester v. Blaisdell*, 137 N. Y. S. 491, 493.

Whether damages recoverable, held jury question. *Maxwell v. Springfield* (Mo. App.), 199 S. W. 600.

¹⁴ Arkansas. *Fayetteville v. Stone*, 104 Ark. 136, 148 S. W. 524.

Illinois. *Keithley v. Peoria*, 193 Ill. App. 167.

Michigan. *Labadie v. Ford*, 185 Mich. 402, 151 N. W. 1046.

New York. *People v. Dickey*, 142 N. Y. S. 776, 157 App. Div. 794.

Nebraska. *Stocking v. Lincoln*, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. (N. S.) 107.

Washington. *Muller v. Great Northern Ry. Co.*, 75 Wash. 631, 135 Pac. 631.

West Virginia. *Perkins v. Princeton*, 80 W. Va. 92, 92 S. E.

be established as the law prescribes,¹⁵ e. g., by ordinance,¹⁶ or resolution, or by some other formal effective municipal action. On the other hand, liability may exist under some laws, as construed, whether the change of grade is from one established or merely from a natural grade,¹⁷ or a grade established by usage, acquiescence and general recognition.¹⁸

Constitutional provisions requiring compensation for property taken or damaged, are not construed precisely the same by the judicial decisions relating to injury to property occasioned from the natural or initial grade, one not duly established in accordance with the applicable law. As mentioned, some deny liability unless the grade changed had been duly established. Others support the rule that where injury results to property im-

242; *Ray v. Huntington*, 81 W. Va. 607, 95 S. E. 23.

Wisconsin. *Henry v. La Crosse*, 165 Wis. 625, 162 N. W. 174.

¹⁵ *Friel v. New York*, 134 N. Y. S. 1025, 150 App. Div. 317.

¹⁶ *Brown v. Sigourney*, 164 Iowa 184, 145 N. W. 478; *Landis v. Marion*, 176 Iowa 240, 157 N. W. 841; *Johnson v. Granville*, 36 N. D. 91, 161 N. W. 721.

¹⁷ *Bismarck Water Supply Co. v. Bismarck*, 23 N. D. 352, 137 N. W. 34.

¹⁸ "A prior formal establishing of grade was not necessary that the change under the survey should constitute a change of grade. A grade of a street may become established by usage, acquiescence and recognition without any formal ordinance on the part of the municipality." *Hunt v. Otego*, 145 N. Y. S. 495, 160 App. Div. 168.

A grade need not be adopted by formal ordinance. "A grade if adopted and improved at the expense of the abutting property

owners is an established grade, and cannot thereafter be changed by the city without payment of consequential damages." *Hollenback v. Seattle*, 88 Wash. 322, 153 Pac. 18; *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304.

"It is not necessary that the city should have first, by ordinance, established a grade line, and then afterwards have changed it, to constitute liability. The use of North Street by the public from 1905 to 1907, when it was improved and the grade line changed was tantamount to an adoption of the street with the natural surface as the grade line, and any subsequent change from that grade line, which injured plaintiff's property, rendered the city liable." *Harman v. Bluefield*, 70 W. Va. 129, 73 S. E. 296; *Rutherford v. Williamson*, 70 W. Va. 402, 74 S. E. 682.

Presumption as to fixing grade from lapse of time. *Philpot v. Tompkinsville*, 148 Ky. 511, 146 S. W. 1093.

proved to conform to a recognized natural grade or a grade fixed by acquiescence, alterations therefrom, whether done negligently or not, entitle the owner to compensation.¹⁹

All decisions agree, however, that an owner who improves his property without regard to grade, whether formally established or recognized only, cannot obtain compensation for a subsequent change of grade.

§ 1978. Nature and extent of change of grade.²⁰

¹⁹ Ray v. Huntington, 81 W. Va. 607, 95 S. E. 23.

²⁰ California. Partridge v. Richmond (Cal. App.), 172 Pac. 166.

Iowa. Vilas v. Chicago, M. & St. P. Ry. Co., 179 Iowa 1244, 162 N. W. 795.

Michigan. Labadie v. Ford, 185 Mich. 402, 151 N. W. 1046.

Maine. Sherburne v. Sanford, 113 Me. 66, 92 Atl. 997.

New York. Hunt v. Otego, 145 N. Y. S. 495, 160 App. Div. 158; People v. Zucca, 145 N. Y. S. 754, 160 App. Div. 578.

Nebraska. Hilger v. Nebraska City, 97 Neb. 268, 159 N. W. 807.

Wisconsin. Schmidt v. Milwaukee, 149 Wis. 330, 135 N. W. 883.

W. Virginia. Ray v. Huntington, 81 W. Va. 607, 95 S. E. 23.

Vermont. Collins v. Barre (Vt.), 101 Atl. 43.

Must be substantial physical change. Sherburne v. Sanford, 113 Me. 66, 92 Atl. 997.

Change from established street grade, when material, damages are recoverable by statute. Landis v. Marion, 176 Iowa 240, 157 N. W. 841.

There must be a substantial departure from the established

grade; slight variance resulting in no prejudice to the property owner will not be deemed material. "Where, however, substantial departure from the established grade resulting in substantial prejudice to the property owner is shown, it cannot be ignored, as immaterial. Such has been our holdings in previous cases." Landis v. Marion, 176 Iowa 240, 157 N. W. 841, 843.

Elevation of railroad tracks, held not a change of grade under law allowing damages for change of grade. Re Grade Crossing Comrs. of Buffalo, 209 N. Y. 139, 102 N. E. 552.

Erection of a viaduct about fifty feet above the level of the street constitutes a change of street grade. People ex rel. v. Ormond, 221 N. Y. 283, 116 N. E. 993, affirming 165 N. Y. S. 179, 178 App. Div. 151.

Grade was established, but the street was not constructed. A house was erected on the street. Subsequently the street was raised to grade, and the surface water affected the house injuriously. There is no remedy, it being *damnum absque injuria*. Ludlow v. Broderick, 181 Ky. 123, 203 S. W. 1082, following Sith v. Louisville

§ 1979. Damages in bringing street to first established grade.²¹

§ 1980. Bridges, viaducts and other structures in streets.²²

§ 1981. Damages for vacating street.²³

& N. R. R. Co., 109 Ky. 177, 58 S. W. 600, 22 Ky. Law Rep. 653.

²¹Initial grade is damaging within constitution. *Richards v. Salt Lake City*, 49 Utah 28, 161 Pac. 680.

No liability for establishment of grade in the first instance. *Man-gum v. Todd*, 42 Okl. 343, 141 Pac. 266; *Louisville v. Lansberg*, 161 Ky. 361, 170 S. W. 962.

No liability in making an original grade of dedicated street. *Best v. Chehalis*, 82 Wash. 601, 144 Pac. 918; *Schuss v. Chehalis*, 82 Wash. 595, 144 Pac. 916.

In establishing and making original street grade, or original grading of street, "it has become the settled law in this state, in harmony with the rule prevailing in most of the other states, that such damage is only consequential, and that the city is not liable therefor." *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089, 1092.

²²*Baltimore & O. R. Co. v. Hammond*, 128 Md. 237, 97 Atl. 532; *Baltimore & O. R. Co. v. Kahl*, 124 Md. 299, 92 Atl. 770; *Baltimore & O. R. Co. v. Kane*, 124 Md. 231, 92 Atl. 532; *Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.), 1128; *Bagnall v. Milwaukee*, 156 Wis. 642, 146 N. W. 791.

Damages due to construction of bridge. Construction of legisla-

tive act. *People ex rel. v. Hennessy*, 205 N. Y. 301, 98 N. E. 516, 206 N. Y. 750, 100 N. E. 407.

Viaduct in street considered as a change of grade and damages assessed accordingly. *People ex rel. v. Ormond*, 221 N. Y. 283, 116 N. E. 993.

Subway. *Susswein v. Bradley Const. Co.*, 172 N. Y. S. 652, 184 App. Div. 852.

²³*Connecticut. Park City Yacht Club v. Bridgeport*, 85 Conn. 366, 82 Atl. 1036.

Illinois. C. Hacker Company v. Joliet, 196 Ill. App. 415.

Iowa. Walker v. Des Moines, 161 Iowa 215, 142 N. W. 51; *Hubbell v. Des Moines*, 173 Iowa 355, 154 N. W. 337; *Louden v. Starr*, 171 Iowa 528, 154 N. W. 331.

New Jersey. Harrison Land Co. v. Crucible Steel Co., 82 N. J. Eq. 414, 89 Atl. 41.

New York. Re Goldman, 132 N. Y. S. 607; *Re White Plains Road*, New York, 170 N. Y. S. 1018, 183 App. Div. 378; *Re Williams Street*, New York, 171 N. Y. S. 116, 103 Misc. Rep. 313; *Re Juniper Ave.*, New York City, 147 N. Y. S. 631, 162 App. Div. 291.

Nebraska. Burkley v. Omaha, 102 Neb. 308, 167 N. W. 72.

"The right of a landowner to compensation for damages caused by the vacation of a public street is wholly statutory." *Newark &*

§ 1982. Construction of sewers and drains.²⁴

§ 1983. Who liable.²⁵

B. R. Co. v. Montclair, 84 N. J. L. 46, 85 Atl. 1028, holding no damages were recoverable under a particular statute for vacating a portion of a street, to abolish a railroad grade crossing, distinguishing the language of the act from others.

Acts providing for closing, held constitutional. *Re Newton Ave.*, New York City, 219 N. Y. 399, 114 N. E. 837, affirming 159 N. Y. S. 478, 173 App. Div. 32.

Damages is based on special injury to abutter, if none, no damages. *Hubbell v. Des Moines*, 183 Iowa 715, 167 N. W. 619, reviewing many Iowa cases; *Re Joiner Street*, Rochester, 164 N. Y. S. 272, 177 App. Div. 361.

See §§ 1408, 1409, ante; §§ 1408, 1409, vol. 3, ante.

Damages not recoverable for vacating portion of street. *Newark & B. R. Co. v. Montclair*, 84 N. J. L. 46, 85 Atl. 1028.

"Whether the alley was no longer needed for public use, and whether the public interest would be subserved by its vacation, could not be made to depend on how much the city could get for its action. The legislative powers of the city must be exercised for the public benefit, but that does not authorize a municipality to sell or bargain legislation as a means of obtaining revenue. It would be a novel proposition to hold that a city, as a condition precedent to the exercise of its lawful power and authority to vacate a street or alley no longer needed for public

use, could demand and receive from private parties a sum of money for its action. Such a holding would be dangerous in principle, contrary to good morals and against public policy." *Lockwood & Strickland Co. v. Chicago*, 279 Ill. 445, 117 N. E. 81, reversing 203 Ill. App. 336.

²⁴ *Caldwell v. Seattle*, 75 Wash. 565, 135 Pac. 470; *Portland Gas & Coke Co. v. Giebisch*, 84 Or. 632, 165 Pac. 1004.

Obstructing channel of a river and diverting its waters on to plaintiff's land; liability denied. *Boise Development Co. v. Boise City*, 30 Idaho 675, 167 Pac. 1032.

²⁵ *Illinois. Goggin v. Chicago*, 162 Ill. App. 368.

Louisiana. Connell v. Yazoo & M. V. R. Co., 141 La. 701, 75 So. 652.

Maryland. Mullan v. Belbin, 130 Md. 313, 100 Atl. 384.

North Carolina. Wood v. Duke Land & Imp. Co., 165 N. C. 367, 81 S. E. 422.

Oregon. Pacific Laundry Co. v. Pacific Bridge Co., 69 Or. 306, 138 Pac. 221.

Railroad constructing an approach to a bridge, for its own benefit, is liable to abutters for special damage. *Baltimore & O. R. Co. v. Hammond*, 128 Md. 237, 97 Atl. 532; *Baltimore & O. R. Co. v. Kahl*, 124 Md. 299, 92 Atl. 770; *Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 46 L. B. A. (N. S.) 1128.

Where in obviating a railroad grade crossing the railroad by au-

§ 1984. Same—liability as between the municipality and the contractor.²⁶**§ 1986. Who may recover damages.²⁷**

Damages may be recovered by the owner of the property injured resulting from the improvement.²⁸

thority of the city constructed an approach to a bridge for its own benefit which interferes with access to an alley the company is liable in damages to an abutting owner suffering special damages. *Baltimore & O. R. Co. v. Kane*, 124 Md. 231, 92 Atl. 532, 535, 536.

If in eliminating a grade crossing of a street with a railroad, the grade of the street is changed, and the company was not connected with the work, it cannot be made liable. *Baltimore & O. R. Co. v. Kane*, 124 Md. 231, 92 Atl. 532.

“The railroad company had the right to elevate or depress its tracks without making compensation to abutters, and irrespective of whether it obtained its right of way by deed or by condemnation.” *Re Grade Crossing Comrs. of Buffalo*, 209 N. Y. 139, 102 N. E. 552.

Contractor is not liable, if free from negligence. *Norton v. Ransome-Crummey Co.*, 173 Cal. 343, 159 Pac. 1177.

Contractor who does work negligently is liable. *Pacific Laundry Co. v. Pacific Bridge Co.*, 69 Or. 306, 139 Pac. 221.

So is city, if it authorizes such negligent work. *Ibid.*

Liability of contractor for construction of subway. *Sesswein v. Bradley Constr. Co.*, 172 N. Y. S. 652, 184 App. Div. 852.

Contractor to construct subway,

who indemnified the city, against damages, held liable. *Schnaier v. Bradley Contracting Co.*, 169 N. Y. S. 88, 181 App. Div. 538; *Dooley v. McMullen, Snare & Triest*, 172 N. Y. S. 135.

²⁶ Where the city has accepted the work, the contractor is relieved from further liability due to the improvement. *White v. Springfield*, 189 Mo. App. 228, 236.

²⁷ *Re Newton Ave.*, New York City, 219 N. Y. 399, 114 N. E. 837, affirming 159 N. Y. S. 478, 173 App. Div. 32.

²⁸ *Doran v. Asbury Park*, 91 N. J. L. 651, 104 Atl. 130; *Pacific Laundry Co. v. Pacific Bridge Co.*, 69 Or. 306, 138 Pac. 221.

Property owners a block distant may recover damages to their property due to negligence of the city in making the street grade resulting in destroying lateral support. *Lochore v. Seattle*, 98 Wash. 265, 167 Pac. 918; *Allbin v. Seattle*, 98 Wash. 275, 167 Pac. 922.

Damages for closing street, persons not owning property abutting or adjoining the street closed cannot recover damages. *Jameson v. Louisville & Nashville R. Co.*, 176 Ky., 654, 197 S. W. 386.

A property owner whose property abuts on the street upon which there is constructed a viaduct, held owner of abutting property entitled to recover under the

The owner usually means the owner of the title to the property involved at the time the street was legally closed,²⁹ or in case of change of grade, the owner at the time of the physical change, as distinguished from the owner at the time of the institution of and during the preliminary proceedings.³⁰

Damages may be recovered by a lessee,³¹ a tenant for life, or for years,³² or a tenant by the entirety,³³ and it has been held that land held by a husband and wife as tenants by the entirety authorizes the wife to make claim irrespective of her husband.³⁴

The owner of abutting property damaged due to construction of a subway, it has been held, may sue on the contract between the city and a contractor whereby the contractor agreed to indemnify the city against all damage claims, where made for his benefit.³⁵

It is sometimes held in construing certain statutes that an action for a street obstruction survives to the personal representatives.³⁶

statute. *Bagnall v. Milwaukee*, 156 Wis. 642, 146 N. W. 791, 793, 794.

²⁹ "The damage is the damage to the owner who had title to the abutting property when the street became legally closed." *Re Juniper Ave.*, New York City, 147 N. Y. S. 631, 633, 162 App. Div. 291, affirmed 213 N. Y. 654, 107 N. E. 1079.

³⁰ *People ex rel. v. Dickey*, 206 N. Y. 581, 100 N. E. 462, affirming 135 N. Y. S. 1135, 151 App. Div. 941.

³¹ Lessee of leasehold may recover. *Iron City Automobile Co. v. Pittsburgh*, 253 Pa. 478, 98 Atl. 679.

Lessee may recover notwithstanding freehold was not damaged. *Philadelphia & Reading*

Coal & Iron Co. v. Boston, 211 Mass. 526, 98 N. E. 1067, 1069.

³² A tenant for life or for years may recover for change of grade under some laws. *Chiesa & Co. v. Des Moines*, 158 Iowa 343, 138 N. W. 922.

³³ *Goodrich v. Otego*, 216 N. Y. 112, 110 N. E. 162, reversing 154 N. Y. S. 1124.

³⁴ *Goodrich v. Otego*, 216 N. Y. 112, 110 N. E. 162, reversing 154 N. Y. S. 1124.

³⁵ *Schnaier v. Bradley Contracting Co.*, 169 N. Y. S. 88, 181 App. Div. 538; *Dooley v. McMullen, Snare & Triest*, 172 N. Y. S. 135.

³⁶ "Causes of action *ex delicto* that survive and may be prosecuted by or against a personal representative primarily and generally are those which affect property

§ 1987. Estoppel.³⁷

A petitioner for public work is not estopped to deny the validity of an ordinance which the municipality had no power to pass.³⁸

So where a property owner petitions that a street be paved, he does not ask for an unlawful thing and he is not thereby estopped from denying the legality of the proceedings which were void under the law. Moreover, no estoppel arises in the absence of a showing that the contractor knew or relied upon the petition.³⁹

§ 1988. Waiver of damages.

One acting under compulsion, as a property owner constructing a sidewalk in obedience to an order from the municipal authorities, does not waive his right to be compensated for any damage that might be thereby caused to his property.⁴⁰

But voluntary removal of a tenant who resided on a

or property rights; the wrong to the person being merely incidental." *Kinney v. West Union*, 79 W. Va. 463, 91 S. E. 260.

³⁷ Signing a petition for preparation of plans for paving, held not to estop claim of damages for grading. *Woolsey v. Chillicothe* (Mo. App. 1919), 209 S. W. 566.

Signing petition for the improvement, held waiver. *Meridan v. Hudson*, 111 Miss. 339, 71 So. 574.

Estopped from claiming a new sidewalk was not useful when property owners petitioned the municipal authorities to construct it. *Curtis v. Tillamook City*, 88 Or. 443, 171 Pac. 574.

Where owner released city from all damages, for change of grade, a mortgagee who afterwards acquired title by foreclosure of the mortgage, held bound. *Shields v.*

Pittsburgh, 252 Pa. 74, 97 Atl. 124.

Omitting to present claim for damages, held precluded recovery. *Dettra v. Philadelphia*, 245 Pa. 139, 91 Atl. 247.

Property owner voting at an election in favor of a street improvement, held he did not thereby consent to change of grade so as to prevent his recovery of damages to his property due thereto. *Hunt v. Otego*, 145 N. Y. S. 495, 160 App. Div. 158.

³⁸ *Perkinson v. Hoolan*, 182 Mo. 189, 81 S. W. 407; *McCormick v. Moore*, 134 Mo. App. 669, 114 S. W. 40; *McQuarter v. St. Joseph*, 134 Mo. App. 640, 114 S. W. 1140.

See § 2120.

³⁹ *Ford v. Phillips*, 159 Mo. App. 482, 486, 487, 141 S. W. 907.

⁴⁰ *Jackson v. Muckenfuss*, 101 Miss. 555, 58 So. 533.

street to be improved is a waiver of right to recover for loss of tenancy due to removal of the building which he occupied in making the improvement.⁴¹

§ 1989. When damages accrue.

Unless the applicable law otherwise provides, until the work of the improvement, as change of grade, is begun damages are not recoverable.⁴²

The cause of action arises or accrues only on the actual physical change. "The establishment of a grade by ordinance or change of one previously established by ordinance is merely preliminary to the improvement of the street, and no claim for damages may be based thereon. These can only result from the consequential physical grading or change of grades."⁴³

§ 1990. Nature and location of property.⁴⁴

§ 1991. Measure of damages.⁴⁵

Damages are usually measured by the lessening of the fair market value of the property affected directly

⁴¹ Ehlers v. Philadelphia, 234 Pa. 591, 83 Atl. 431.

⁴² Hicks v. Williamsport, 235 Pa. 509, 84 Atl. 435.

⁴³ Vilas v. Chicago, M. & St. P. Ry. Co., 179 Iowa 1244, 162 N. W. 795.

Damages for vacating an alley need not be ascertained and paid before the vacating ordinance can have force. Hubbell v. Des Moines 183 Iowa 715, 167 N. W. 619.

In closing a street, the street is regarded closed as to the accruing of damages, and hence one who owns the abutting property at the time may recover damages. Re West 151st Street, New York City, 133 N. Y. S. 894, 149 App. Div. 55.

⁴⁴ Re West 151st Street, New York City, 133 N. Y. S. 894, 149 App. Div. 55.

⁴⁵ Connecticut. Rogers v. New London, 89 Conn. 343, 94 Atl. 364. Georgia. Atlanta v. Atlas Realty Co., 17 Ga. App. 426, 87 S. E. 698; Williamson v. Savannah, 19 Ga. App. 784, 92 S. E. 291.

Kentucky. Louisville v. Koshe-wa, 161 Ky. 359, 170 S. W. 964; Lexington v. Chenault, 151 Ky. 774, 152 S. W. 939.

Maine. Sherburne v. Sanford, 113 Me. 66, 92 Atl. 997.

Massachusetts. Wooley v. Fall River, 220 Mass. 584, 108 N. E. 367.

Missouri. Medley v. Jackson (Mo. App.), 200 S. W. 676.

New York. Kehres v. New York,

due to the work of the improvement, to be ascertained from the nature of the improvement and the circumstances of each case in view of the local law applicable.⁴⁶

147 N. Y. S. 825, 162 App. Div. 349; *Re Colvin St.*, Buffalo, 140 N. Y. S. 882, 155 App. Div. 808; *Re Cauldwell*, 141 N. Y. S. 734, 156 App. Div. 661; *Goodrich v. Otego*, 216 N. Y. 112, 110 N. E. 162.

North Carolina. *J. A. & C. E. Bennett v. Winston-Salem South-Bound Ry. Co.*, 170 N. C. 389, 87 S. E. 133.

West Virginia. *Perkins v. Princeton*, 80 W. Va. 92, 92 S. E. 242; *Rutherford v. Williamson*, 70 W. Va. 402, 74 S. E. 682.

Washington. *Willeft v. Seattle*, 96 Wash. 632, 165 Pac. 876.

Improvement by drainage. *Nay-smith v. Auburn*, 95 Neb. 582, 146 N. W. 971.

Construction of sewer. Where property is not rented but occupied by the owner the measure is the injury to the use and occupancy of the property, not diminution in the rental value. *Baughn v. Corbin*, 170 Ky. 426, 186 S. W. 131.

Removal of lateral support. *Ferandis v. Seattle*, 65 Wash. 587, 164 Pac. 225.

Construction of subway. *Sus-swein v. Bradley Constructing Co.*, 172 N. Y. S. 652, 184 App. Div. 852.

Where the injury is permanent due to an excavation in change of street grade, the measure is the diminution in the market value of the property. *Warden v. Bielenberg*, 119 Minn. 330, 138 N. W. 314.

Lots of parcel of land which may be affected or injured in consequence of alteration of the grade

of the street. *Schmidt v. Milwaukee*, 149 Wis. 367, 135 N. W. 883, 887.

Change of street grade, evidential facts. *Murphy v. Meridan*, 103 Miss. 110, 60 So. 48.

Change of grade; when question of amount of damages is controverted, it is a question of fact. *Melvin v. Mound City*, 185 Mo. App. 522, 172 S. W. 482.

⁴⁶ In public improvement damage the same as in proceeding to condemn; no depreciation allowed. *Otis Elevator Co. v. Chicago*, 263 Ill. 419, 105 N. E. 338, 52 L. R. A. (N. S.) 192.

Grading and paving and curbing the cartway of the street. *Burns v. Reynoldsville Borough*, 48 Pa. Super. Ct. 122.

Injury to leasehold. "The measure of damages is the same whether the plaintiff be a tenant for years or an owner in fee, and that is the difference in the value of the property before the injury and as affected by the completed improvement; thus in the case of a tenant, the damages are measured in the market value for any useful purpose, of the balance of the term, at the time of the completion of the improvement." *Iron City Automobile Co. v. Pittsburgh*, 253 Pa. 478, 98 Atl. 679, 685.

"The measure of damages in the case of an ordinary leasehold is the amount any one would pay for the unexpired term over and above the rent and other charges," fixed in the contract or lease. *Iron City*

Sometimes interest will be allowed on the amount awarded.⁴⁷

§ 1992. Proceedings to assess damages.⁴⁸

The method of assessing damages due to public improvements prescribed by the local law, must be followed.⁴⁹

Automobile Co. v. Pittsburgh, 253 Pa. 478, 98 Atl. 679, 685, quoting from *Consolidated Ice Co. v. Pennsylvania R. R. Co.*, 224 Pa. 287, 73 Atl. 937.

Tenant by the entirety. Husband and wife as owners of an estate by the entirety. Measure is diminution of value of his estate, and not loss of rents and profits or damage to his use and occupancy. *Goodrich v. Otego*, 216 N. Y. 112, 110 N. E. 162, reversing 154 N. Y. S. 1124.

⁴⁷ *Gibson v. Des Moines (Iowa)*, 156 N. W. 374; *Chamberlain v. Des Moines*, 172 Iowa 500, 154 N. W. 766; *Re 149th Street Realty Co.*, 167 N. Y. S. 367, 179 App. Div. 786; *Re Baker*, 164 N. Y. S. 867, 178 App. Div. 1.

Street opening, when interest on award not allowed. *Re Einstein*, 135 N. Y. S. 227, 150 App. Div. 856.

⁴⁸ *Connors v. St. Joseph*, 237 Mo. 612, 141 S. W. 638; *Collins v. Barre (Vt.)*, 101 Atl. 43.

⁴⁹ *Franklin Society, etc. v. Haworth Borough*, 85 N. J. L. 533, 89 Atl. 772.

Street opening. *Philadelphia B. & W. R. Co. v. Baltimore*, 124 Md. 635, 93 Atl. 146; *Dietrich v. Philadelphia*, 248 Pa. 586, 94 Atl. 274; *Re Pugsley Avenue*, New York City, 218 N. Y. 234, 112 N. E. 918.

In street opening, to be assessed

in single proceeding. *Dettra v. Philadelphia*, 245 Pa. 139, 91 Atl. 247.

Closing street. *Re Juniper Ave.*, New York City, 147 N. Y. S. 631, 162 App. Div. 291, affirmed in 213 N. Y. 654, 107 N. E. 1079; *Re West 151st Street*, New York City, 133 N. Y. S. 894, 149 App. Div. 55.

Widening street. *Necartney v. Chicago*, 273 Ill. 276, 112 N. E. 675.

Grading of a street. *State ex rel. v. Goodrich*, 257 Mo. 40, 165 S. W. 707.

Repair of street. *Warner v. Pittsfield*, 231 Mass. 138, 120 N. E. 379.

Change of street grade. *Burrell v. New York*, 149 N. Y. S. 812, 164 App. Div. 245; *People ex rel. v. Seaman*, 154 N. Y. S. 539, 168 App. Div. 870; *Lake Bowling Alley v. Richmond*, 116 Va. 429, 82 S. E. 97.

Viaduct in street considered as change of grade and damages assessed accordingly. *People ex rel. v. Ormond*, 221 N. Y. 283, 116 N. E. 993.

Provisions relating to the assessment of damages when change of street grade is made, held applicable in construction of viaduct. *Bagnall v. Milwaukee*, 156 Wis. 642, 146 N. W. 791, 793, 794.

Construction of bridge. *People*

Notice and hearing to property owners are usually required in express terms.⁵⁰

§ 1993. Review of assessment proceedings.⁵¹

§ 1994. Payment of damages.⁵²

Under some laws payment of damages in advance of the improvement is required, and if not paid when they accrue interest may be allowed.⁵³

But in Missouri, it seems, that in changing a street grade, damages are not required to be ascertained and paid in advance of doing the work, because the constitutional provision is not applicable to such incidental dis-

v. Hennessy, 205 N. Y. 301, 98 N. E. 516.

⁵⁰ Burkley v. Omaha, 102 Neb. 308, 167, N. W. 72.

⁵¹ See §§ 2015, 2016, post; §§ 2015, 2016, vol. 4, ante. Hirsch v. North Braddock Borough, 252 Pa. 22, 97 Atl. 113.

Appeal. Re Einstein, 135 N. Y. S. 227, 150 App. Div. 856.

Under some laws, court may review both questions of law and fact by appeal. Re Joiner Street, Rochester, 164 N. Y. S. 272, 177 App. Div. 361.

Court on appeal will presume that commissioners allowed interest on the award, as the law required. Re Baker, 164 N. Y. S. 867, 178 App. Div. 1.

Court held without power to review determination of board of assessors. People ex rel. v. Zucca, 134 N. Y. S. 693, 150 App. Div. 194; People ex rel. v. Hennessy, 134 N. Y. S. 691.

Where board of assessors acts in a judicial manner, as under some laws, their action may be reviewed by certiorari. Burrell v. New

York, 149 N. Y. S. 812, 817, 164 App. Div. 245.

Determination of board of assessors as to amount of award, held not subject to review by the courts by certiorari. People ex rel. v. Hennessy, 131 N. Y. S. 327, 146 App. Div. 440.

⁵² Goodrich v. Otego, 216 N. Y. 112, 110 N. E. 162, reversing 154 N. Y. S. 1124.

⁵³ Interest allowed on damages. Gibson v. Des Moines (Iowa), 156 N. W. 374.

The laws provide for payment in advance of the change of grade, thus creating liability as of that date, and "if the city does not pay or tender the money in advance of the change, interest is necessary to make the injured party whole, and under the general statute allowing interest on sums due, we think interest should be allowed." Chamberlain v. Des Moines, 172 Iowa 500, 154 N. W. 766.

When interest not allowed on award. Re Einstein, 135 N. Y. S. 227, 150 App. Div. 856.

advantages as may result in such case to an abutting proprietor.⁵⁴

§ 1995. Deduction of benefits.⁵⁵

§ 1996. Delay in bringing action or making claim.⁵⁶

§ 1997. Remedies by property owners.

In seeking redress for actionable injuries to property due to public improvements, the usual legal and equitable remedies may be invoked, but such remedies are in the main purely statutory.⁵⁷

⁵⁴ *McGrew v. Granite Bituminous Paving Co.*, 247 Mo. 549, 155 S. W. 411, containing treatment of the Missouri law, and disapproving certain cases.

⁵⁵ *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676; *Burns v. Reynoldsville Borough*, 48 Pa. Super. Ct. 122; *Re Nunez*, 164 N. Y. S. 841, 99 Misc. Rep. 645.

Special benefits may be set off against special damages. *Rogers v. New London*, 89 Conn. 343, 364, 94 Atl. 364.

A taking or damaging by a municipality is subject to an offset for benefits. *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478; *Lincoln County v. Brock*, 37 Wash. 14, 79 Pac. 477; *Gaylor v. Bridgeport*, 90 Conn. 235, 96 Atl. 936.

⁵⁶ Section 1989, ante.

Time of filing claim limited. *People ex rel. v. Ormond*, 167 N. Y. S. 63, 179 App. Div. 755.

Description of defect and injury. *Allbin v. Seattle*, 98 Wash. 275, 167 Pac. 922.

Limitation of presentation of damage claim for vacating street. *Re Newton Ave.*, New York City, 219 N. Y. 399, 114 N. E. 837, af-

firming 159 N. Y. S. 478, 173 App. Div. 32.

Delay six years, held to bar claim. *Re Opening Walton Ave.*, New York City, 142 N. Y. S. 120, 156 App. Div. 775.

Limitation of filing claim and making application for damages for repair of public way. *Warner v. Pittsfield*, 231 Mass. 138, 120 N. E. 379.

Limitation in bringing action. *Kinney v. West Union*, 79 W. Va. 463, 91 S. E. 260.

Failure to present claim for damages precludes recovery. *Dettra v. Philadelphia*, 246 Pa. 139, 91 Atl. 247.

⁵⁷ Changing street grade; action for damages on completion of work. *Atlanta v. Nelson*, 142 Ga. 324, 82 S. E. 899; *Burns v. Rome*, 144 Ga. 480, 87 S. E. 414; *Gogerty v. Decatur*, 190 Ill. App. 548; *Keithley v. Peoria*, 193 Ill. App. 167; *Martin v. Baden Borough*, 233 Pa. 452, 82 Atl. 686; *Kindred v. Philadelphia*, 239 Pa. 329, 86 Atl. 873; *Fornof v. Wilkinsburg Borough*, 238 Pa. 614, 86 Atl. 494; *Heidorn v. Kirkwood*, 169 Mo. App. 156, 152 S. W. 374; *Melvin v. Mound*

§ 1998. Elements of damages.⁵⁸§ 1999. Same—interference with access to property.⁵⁹§ 2001. Same—injury or destruction of shade trees.⁶⁰

City, 185 Mo. App. 522, 172 S. W. 482.

Re-location of street; statutory remedy to be pursued. *Stiles v. Franklin*, 173 N. C. 651, 92 S. E. 599.

Action to assess damages. *Sherburne v. Sanford*, 113 Me. 66, 92 Atl. 997; *Philadelphia & Reading Coal & Iron Co. v. Boston*, 211 Mass. 526, 98 N. E. 1067; *Wooley v. Fall River*, 220 Mass. 584, 108 N. E. 367.

Equitable proceeding sustained. *Collins v. Barre (Vt.)*, 101 Atl. 43; *Wheeler v. St. Johnsbury*, 87 Vt. 46, 87 Atl. 349.

Action for damages. *Gaustad v. Enderlin*, 23 N. D. 526, 137 N. W. 613.

Action for damages denied. *Rigney v. New York Central & H. R. Co.*, 217 N. Y. 31, 111 N. E. 226, affirming 146 N. Y. S. 395, 161 App. Div. 187; *Congregation Rodeph Sholom v. Bradley Const. Co.*, 165 N. Y. S. 507.

Action for damages, limitations. *Ludwigs v. Walla Walla*, 83 Wash. 205, 145 Pac. 193; *Earnhardt v. Lexington*, 157 N. C. 234, 72 S. E. 864.

Action by lessee. *Cassel v. New York*, 153 N. Y. S. 410, 167 App. Div. 831.

Removal of lateral support; when cause of action accrues. *Marks v. Seattle*, 88 Wash. 61, 152 Pac. 706.

Action for negligently constructing a fill in front of plaintiff's home for the purpose of grading

and improving the street. *Hoyle v. Hickory*, 167 N. C. 619, 83 S. E. 738, citing § 1968, p. 4220, vol. 4, ante.

⁵⁸ *Goodrich v. Otego*, 216 N. Y. 112, 110 N. E. 162, reversing 154 N. Y. S. 1124.

Change of highway and closing and opening certain town roads. *Re Croton Falls Dam & Reservoir*, 137 N. Y. S. 554, 152 App. Div. 730.

Changing and lowering sidewalk; destruction of old sidewalk is not an element. *Ludwigs v. Walla Walla*, 83 Wash. 205, 145 Pac. 193.

Cost to put property in substantially the same condition with reference to new grade as it was as to old, is element. *Milwaukee Trust Co. v. Milwaukee*, 151 Wis. 224, 138 N. W. 707.

⁵⁹ Section 1383, ante.

Construction of viaduct to eliminate a grade crossing; impairment of access of nonabutting property owner; damages denied. *Schmidt v. Cleveland*, 1 Ohio App. 264, 34 Ohio Cir. Ct. 7.

⁶⁰ Sections 1326, 1327, ante.

Damages for unnecessary destruction of shade trees are recoverable. *Worth v. Westfield (N. J. L.)*, 90 Atl. 727; *Stocking v. Lincoln*, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. (N. S.) 107.

If the removal of shade trees was not a necessary incident to the changing of the street grade the act in removing them was without legal justification and damage was

§ 2002. Surface water.⁶¹

"An action of tort at common law will not lie against a city or town for diverting the surface water from its streets in order to keep them safe, and causing it to flow upon adjoining premises, even when the surface water is drained into a culvert or water course. The remedy is under the statute."⁶²

If surface water flows after the grading of a street as it flowed before, of course, there is no municipal liability.⁶³

A municipality has no right by artificial drains to divert surface water from the course it would otherwise take and cast it in a body large enough to do substantial injury on private land, where but for such artificial drain it would not go.⁶⁴

VI. REMEDIES.

§ 2003. Judicial interference with public improvements.⁶⁵

The propriety, advisability, necessity, extent, character, etc., of public improvements, vesting in the discretion

recoverable therefor. *Worth v. Westfield* (N. J. L.), 90 Atl. 727.

"At common law where no compensation was allowed to the abutting owner, the municipal authorities had the right to destroy shade trees in the streets without compensation when making authorized highway improvements, such as a change of grade, but the purpose of the statute is to impose liability when the land adjacent to the street is injuriously affected as it may be by damage to shade trees." *Goodrich v. Otego*, 216 N. Y. 112, 110 N. E. 162, reversing 154 N. Y. S. 1124, approving *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549.

⁶¹ *Naysmith v. Auburn*, 95 Neb. 582, 146 N. W. 971.

⁶² *Blaisdell v. Stoneham*, 229 Mass. 563, 118 N. E. 919.

⁶³ *Todd v. St. Louis Southwestern Ry. Co.* (Tex. Civ. App.), 173 S. W. 617.

⁶⁴ *Doran v. Asbury Park*, 91 N. J. L. 651, 104 Atl. 130, approving *Kehoe v. Rutherford*, 74 N. J. L. 659, 65 Atl. 1046, 122 Am. St. Rep. 411.

Raising street grade in such manner as to throw rainwater on land of adjacent proprietor, gives cause of action. *Clarksville v. McMillan*, 143 Ga. 335, 85 S. E. 110.

⁶⁵ See § 1834 et seq., ante; § 1834 et seq., vol. 4, ante.

Beale v. Santa Barbara (Cal.

of the municipal authorities, is not subject to judicial interference unless exercised capriciously, arbitrarily, oppressively or fraudulently which results in invasion of property rights.⁶⁶

§ 2004. Same—injunction.⁶⁷

In view of the uniformly conceded broad discretion vested in the municipal authorities, in the absence of

App.), 162 Pac. 657; *Rockwell v. Junction City*, 93 Kan. 1, 142 Pac. 268; *Kelly Land Co. v. Webb City*, (Mo. App. 1919), 209 S. W. 299, citing § 2003, vol. 4, ante; *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645, 647, citing § 2003, p. 4289, vol. 4, ante.

⁶⁶ Necessity of street pavement. *Oak Park v. Swigart*, 262 Ill. 614, 104 N. E. 1033; *Damron v. Huntington*, 82 W. Va. 401, 96 S. E. 53.

Advisability of changing street grade. *McCabe v. New York*, 213 N. Y. 468, 107 N. E. 1049.

Necessity for sewers. *Bell v. Burlington*, 154 Iowa 607, 134 N. W. 1082.

Necessity, etc., of new sidewalk. *Van Valkenburgh v. Milwaukee*, 157 Wis. 55, 143 N. W. 1052.

Necessity or expediency of acquiring property by exercising the power of eminent domain. *Re Ely Ave., New York City*, 217 N. Y. 45, 111 N. E. 266, reversing 153 N. Y. S. 1049, 168 App. Div. 867.

Extent of the street improvements rests in the discretion of the municipal authorities. No court interference "unless it clearly appears that it has been abused and exercised in an unreasonable manner." *Kankakee v. Illinois Central R. Co.*, 257 Ill. 298, 100 N. E. 996, 998.

Ordinance improving an outlying street; reasonableness. *Shaw v. Stoeltzing*, 180 Mo. App. 113, 117, 167 S. W. 1158.

Presumption exists in favor of legality. *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173, 175.

In opening street, courts will not inquire into the propriety unless exceptional circumstances appear. *Miller v. L. R. Figg Co.*, 175 Ky. 495, 194 S. W. 566.

Change grade; no court interference. *McCabe v. New York*, 213 N. Y. 468, 107 N. E. 1049, affirming 140 N. Y. S. 127, 155 App. Div. 262.

Mandamus to compel a board to certify the completion of a public improvement. *Price v. Board of Local Imp.*, 266 Ill. 299, 107 N. E. 611, affirming 187 Ill. App. 629.

Fraud and mistake. *Young v. Holyoke*, 225 Mass. 140, 114 N. E. 62.

⁶⁷ Alabama. *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173.

Arizona. *Farmer v. Dahl*, 19 Ariz. 395, 171 Pac. 130.

Florida. *Whitner v. Woodruff*, 68 Fla. 465, 67 So. 110.

Georgia. *Southern Cement Stone Co. v. Logan Coal & Supply Co.*, 140 Ga. 71, 78 S. E. 417.

Illinois. *Mushbaugh v. East Peoria*, 260 Ill. 27, 102 N. E. 1027.

allegations of bad faith, collusion, fraud, or violation of mandatory and jurisdictional provisions of the controlling law, courts will not substitute their judgment for that of the local officers relating to procedure in public improvements. The presumption is that the officers will follow the law.⁶⁸

Idaho. *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381.

Missouri. *Kelly Land Co. v. Webb City* (Mo. App. 1919), 209 S. W. 299, citing § 2003, vol. 4, ante.

New York. *Whitmore, Rauber & Vicinus v. Edgerton*, 149 N. Y. S. 508, 87 Misc. Rep. 216.

North Carolina. *Asbury v. Albe-
marle*, 162 N. C. 247, 78 S. E. 146.

Pennsylvania. *McAndrew v. Dunmore Borough*, 245 Pa. 101, 91 Atl. 237.

Virginia. *Appalachia v. Main-
ous*, 121 Va. 666, 93 S. E. 566.

No injunction will lie if adequate legal remedy exists. *Catts v. Smyrna* (Del. Ch.), 91 Atl. 297; *Smith v. Sedalia*, 244 Mo. 107, 125, 149 S. W. 597.

Denied where remedy by appeal may be invoked. *Reynolds v. Cosmopolis*, 84 Wash. 660, 147 Pac. 407.

To restrain grading street. *Hilger v. Nebraska City*, 97 Neb. 268, 149 N. W. 807.

To restrain construction of sewer. *Thomas v. Grinnell*, 171 Iowa 571, 153 N. W. 91; *Newport v. Lang*, 155 Ky. 776, 160 S. W. 499.

To restrain the public authorities from carrying out the terms of a paving contract. *Cherry v. Bowman*, 106 Ark. 39, 105 S. W. 133; *Frazier v. Rockport*, 99 Mo. App. 80, 202 S. W. 266.

By property owners to restrain the municipal authorities from entering into a paving contract, alleging defects, etc., in the letting to "lowest responsible bidder." *Williams v. Topeka*, 85 Kan. 857, 118 Pac. 864.

Limitation fixed by statute. Note, *Chickasaw v. O'Brien* (Okl.), 159 Pac. 282.

⁶⁸ By railway to restrain street paving alleging interference with railway tracks, property, etc., and operation thereof, denied. *Omaha L. & B. R. Co. v. Lincoln*, 97 Neb. 122, 149 N. W. 319.

To prevent the construction of a dam and reservoir and the diversion of the waters of a river alleged to interfere with complainant's property rights, for many reasons stated, denied. *Sears v. Akron*, 246 U. S. 242, 38 Sup. Ct. 245.

Denied to enjoin the publication of a resolution declaring the necessity of street improvements at the expense of benefited property owners, as it was prematurely instituted. *Pitser v. Pawnee*, 47 Okl. 559, 149 Pac. 201.

Variance of from ten to eighteen inches from the established grade of a street improvement, held an irregularity only, and court would not enjoin assessments therefor. *Shaver v. J. W. Turner Imp. Co.*, 155 Iowa 492, 136 N. W. 711, 133 N. W. 770.

Therefore, the law is well settled that, if what the city does merely amounts to an irregularity, either in publishing notice or in letting contracts, or in their execution, etc., the assessment or tax imposed to defray the cost of the improvement cannot be collaterally assailed in equity or otherwise. If, however, what the city does or omits to do affects its power or jurisdiction to make the proposed improvements, that is, if the publication of the notice is jurisdictional, and the city in publishing such notice does not comply with the requirements of the law, and, for that reason, does not acquire jurisdiction to order or to make the proposed improvement and to levy the special tax to defray the cost thereof upon the abutting property, then the tax may be collaterally assailed at any time.⁶⁹

To enjoin proceedings under certain ordinances establishing improvement districts alleging violation of applicable law and material irregularities. Denied. *Buxton v. Nashville*, 132 Ark. 511, 201 S. W. 512.

By abutting property owners to enjoin the carrying out of a contract for curbing and guttering certain streets and the levying of assessments to pay for the work because of alleged failure to observe mandatory provisions of the applicable law. Local statute construction mainly involved. *Smith v. Courtland*, 103 Kan. 142, 172 Pac. 1027.

By abutting property owners to enjoin city for entering into a contract for the construction of a pavement on the street and to have the ordinance authorizing the improvement adjudged void, alleging abuse of discretion in letting the contract for a patented pavement under a law requiring competitive bidding. Denied. *Custer v. Spring-*

field, 167 Mo. App. 354, 151 S. W. 759.

By abutting owners to enjoin the levying of a paving assessment because the resolution of necessity called for repairing the street by patching, whereas the work done was reconstruction, denied, since the proceedings were regular and, moreover, the property owners might present their objections to the city council, and appeal. *Ellyson v. Des Moines*, 179 Iowa 882, 162 N. W. 212, approving *Hubbell v. Des Moines*, 168 Iowa 418, 424, 150 N. W. 703, and other Iowa decisions.

⁶⁹ *Gwilliam v. Ogden City*, 49 Utah 555, 164 Pac. 1022, 1024, citing § 2004, vol. 4, ante.

Attempt to levy special assessment for a general not a local improvement will be enjoined. *Globe v. Willis*, 16 Ariz. 378, 146 Pac. 544.

To prevent sale of land to satisfy sewer assessments on ground the proceedings were void sus-

“Sometimes a court of equity will decline to raise its restraining arm and refuse to issue an injunction, leaving the injured party to his remedy at law, even though an admitted legal right has been violated, when it appears that the intervening rights of the public should be taken into consideration, and the issuance of an injunction would cause serious public inconvenience or loss without a correspondingly great advantage to the complainant.”⁷⁰

§ 2006. Same—to prevent alteration of grade or width of street.⁷¹

§ 2007. Same—to restrain vacation of street.⁷²

tained. *Fisher v. St. Albans*, 87 Vt. 524, 90 Atl. 582.

Will lie where the proceedings are void as failure to let the contract by competitive bidding as required by a mandatory statute. *Hoosier Const. Co. v. Seibert* (Ind. App.), 114 N. E. 981, 984.

Denied in proceeding to vacate a street. *Harrison Land Co. v. Crucible Steel Co.*, 82 N. J. Eq. 414, 89 Atl. 41.

Injunction sustained to restrain the construction of a drain where the authorities had failed to observe a jurisdictional prerequisite, namely, that a public demand for the drain existed, to be evidenced by petition signed by a specified number of citizens of the municipality. *Stoltze v. Sheridan*, 28 N. D. 194, 148 N. W. 1.

⁷⁰ *Frazer v. Portland*, 81 Or. 92, 158 Pac. 514, 516.

To restrain operation of sewer system denied. *Smith v. Sedalia*, 244 Mo. 107, 125, 149 S. W. 597.

⁷¹ Bill in equity to secure a restoration of a sidewalk which

had been widened to its original width denied where the right of the municipality to fix the width of sidewalks could not be doubted. *Werner v. Pittsburgh*, 256 Pa. 407, 100 Atl. 985.

⁷² “It is only as the owner of property that will suffer a special injury, different in kind as well as in degree from that sustained by the public generally, that plaintiff can have any standing in an action to enjoin the vacation. The record shows conclusively, not only that plaintiff owns no property abutting on the portion of the street sought to be vacated, but that access to his property will be in no way interfered with.” *Thorpe v. Ada*, 137 Minn. 86, 162 N. W. 886, denying an injunction, and stating: “The cases relied on by plaintiff *Fitzer v. St. Paul City Ry. Co.*, 105 Minn. 221, 117 N. W. 434, 18 L. R. A. (N. S.) 268, 127 Am. St. Rep. 557, and *Vanderburgh v. Minneapolis*, 98 Minn. 329, 108 N. W. 480, 6 L. R. A. (N. S.) 741, are clearly not in point.”

§ 2008. Same—who entitled to injunction.⁷³

§ 2010. Conclusiveness and collateral attack.⁷⁴

§ 2012. Who may question validity of proceedings.⁷⁵

§ 2013. Waiver of defects and objections.⁷⁶

§ 2014. Application of doctrine of estoppel.⁷⁷

⁷³ **Taxpayer.** Whitmore, Rauber & Vicinus v. Edgerton, 149 N. Y. S. 508, 87 Misc. Rep. 216; Mushbaugh v. East Peoria, 260 Ill. 27, 102 N. E. 1027.

Taxpayer against whom an assessment was made for the improvement can attack its validity in a court of equity. McAndrew v. Dunmore Borough, 245 Pa. 101, 91 Atl. 237.

⁷⁴ **Prevo v. Hammond**, 186 Ind. 612, 116 N. E. 584; **Curless v. Watson**, 54 Ind. App. 110, 100 N. E. 576; **Re Ransom**, 149 N. Y. S. 1056, 87 Misc. Rep. 1; **Decatur v. Barteau**, 260 Ill. 612, 103 N. E. 601; **Re Ely Ave., New York City**, 217 N. Y. 45, 111 N. E. 266, approving **McCabe v. New York**, 213 N. Y. 468, 107 N. E. 1049; **Crane v. Oregon R. & Nav. Co.**, 66 Or. 317, 133 Pac. 810; **Gwilliam v. Ogden City**, 49 Utah 555, 164 Pac. 1022, 1024, citing § 2010, vol. 4, ante.

Finding that the petition for the paving by the municipal board was signed by the requisite number, held prima facie, but not conclusive. **Pasche v. St. Joseph**, 174 Mo. App. 614, 161 S. W. 722.

Law making the finding of the council conclusive as to sufficiency of the petition of property owners for the improvement, with right of application for correction, held valid. **Waters v. Whitecomb**, 110 Ark. 511, 162 S. W. 61.

“On collateral attack it will be conclusively presumed that the city council found the existence of the conditions justifying the improvement, and that such finding was correct.” **Richardson v. Olympia**, 83 Wash. 638, 145 Pac. 963.

Action of council in establishing sewer districts, held not subject to collateral attack. **McGhee v. Walsh**, 249 Mo. 266, 283, 286, 287, 155 S. W. 445.

In the absence of allegation of fraud, collateral attack denied. **Phipps v. Medford**, 81 Or. 119, 158 Pac. 666, 81 Or. 119, 156 Pac. 787.

⁷⁵ **Abutting property owner** may question the validity of a street improvement contract as he is directly interested. **Frazier v. Rockport**, 199 Mo. App. 80, 202 S. W. 266.

Property owner and taxpayer in the improvement district. **Clyde v. Moscow**, 23 Idaho 592, 131 Pac. 381.

Taxpayer. **Farmer v. Dahl**, 19 Ariz. 395, 171 Pac. 130.

⁷⁶ **Pitt Const. Co. v. Dayton**, 237 Fed. 305; **Hubbell v. Des Moines**, 168 Iowa 418, 150 N. W. 701 (not jurisdictional).

Objection presented, but not urged, regarded as waived. **Des Plaines v. Winkelman**, 270 Ill. 149, 110 N. E. 417.

⁷⁷ **People ex rel. v. Cherry**, 262 Ill. 110, 104 N. E. 209, 211; **Burns**

§ 2015. Review by appeal.⁷⁸**§ 2016. Review by certiorari.⁷⁹**

v. Atlanta, 22 Ga. App. 381, 803, 96 S. E. 11.

⁷⁸ Arkansas. Malvern v. Nunn, 127 Ark. 418, 192 S. W. 909.

Kansas. Epstein v. Caney, 87 Kan. 329, 124 Pac. 421.

New York. Re Einstein, 135 N. Y. S. 227, 150 App. Div. 856; Re Joiner Street, Rochester, 164 N. Y. S. 272, 177 App. Div. 361; Re Baker, 164 N. Y. S. 867, 178 App. Div. 1.

Oregon. Portland v. Tigard, 64 Or. 404, 130 Pac. 982; Crane v. Oregon R. & Nav. Co., 66 Or. 317, 133 Pac. 810.

Appeal denied. People ex rel. v. Ormond, 168 N. Y. S. 255, 181 App. Div. 242.

Review of award of assessors by board of revision is provided. People ex rel. v. Seaman, 154 N. Y. S. 539, 168 App. Div. 870.

Award of damages for change of street grade is subject to appeal. People v. Hennessy, 141 N. Y. S. 359, 156 App. Div. 549, following People v. Hennessy, 205 N. Y. 301, 98 N. E. 516.

It is within the legislative competency, to authorize the trial of assessment issues, arising under the taxing power to be determined by a court without a jury, without impinging constitutional provisions. Tuscaloosa v. Hill, 14 Ala. App. 514, 69 So. 486.

⁷⁹ Sayes v. Pittsfield Board of Public Works, 122 Mass. 93, 109 N. E. 823; State ex rel. v. Goodrich, 257 Mo. 40, 165 S. W. 707; Johnson v. Monmouth Beach Borough, 86 N. J. L. 640, 92 Atl. 347;

People ex rel. v. Hennessy, 131 N. Y. S. 327, 146 App. Div. 440; Burrell v. New York, 149 N. Y. S. 812, 817, 164 App. Div. 245.

To review validity of ordinance providing for improvement authorized by state law. Donnelly v. Longport Borough, 88 N. J. L. 68, 95 Atl. 740.

To review resolutions authorizing improvements where contention was that ordinance was necessary. Hackett v. Hussels (N. J. L.), 102 Atl. 527.

To review an ordinance for widening a street where private land is to be taken. "The ordinance itself provides that the land shall be taken upon making compensation to the owner by purchase at a price to be agreed upon, and if an agreement cannot be reached, by the payment of damages as provided by law. The objections therefore on the ground that no proper effort has been made to agree with the landowner are premature. If such efforts are not made it will be time enough to raise the objection when the borough undertakes to condemn. In fact the ordinance contemplates a purchase by agreement with the owner. As to the objection that the widening of the street is unnecessary, it is enough to say that the question is one of judgment, and we cannot set up our judgment against that of the borough authorities." Goldschmidt v. Keyport Borough (N. J. L.), 99 Atl. 916.

CHAPTER 38.

SPECIAL TAXATION AND LOCAL ASSESSMENTS.

- I. NATURE, CONSTITUTIONAL RESTRICTIONS AND POWER TO LEVY.
- II. KINDS OF IMPROVEMENTS FOR WHICH AUTHORIZED.
- III. PROPERTY SUBJECT TO ASSESSMENT.
- IV. PROPERTY EXEMPT FROM ASSESSMENT.
- V. EXERCISE OF POWER.
- VI. THE LIEN.
- VII. VALIDITY AND REMEDIES.
- VIII. COLLECTION AND ENFORCEMENT.

I. NATURE, CONSTITUTIONAL RESTRICTIONS AND POWER TO LEVY.

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| § 2018. Same—theory is benefit conferred. | § 2023. Same—construction of power. |
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III. PROPERTY SUBJECT TO ASSESSMENT.

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| § 2050. Railroad property. | § 2062. Property benefited. |
| § 2051. Same—various uses illustrated. | § 2062a. Property devoted to public use. |
| § 2052. Assessment districts. | § 2062b. Same — telephone exchange. |
| § 2053. Sewers and drains. | § 2062c. Leaseholds. |

IV. PROPERTY EXEMPT.

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| § 2071. Same—commissioners. | § 2086. Same—personal assessment, against landowners. |
| § 2074. Notice of assessment to property owners. | § 2087. Apportionment of assessments. |
| § 2075. Sufficiency of notice. | § 2088. Same—according to benefits. |
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| § 2077. Hearing on proposed assessment. | § 2090. Same—superficial area. |
| § 2078. Time for making assessment. | § 2091. Same—each lot for the improvement in front of it. |
| § 2079. Same—with reference to completion of improvement. | § 2092. Same—omission of property. |
| § 2080. Levy of assessment. | § 2093. Same—deduction of damages. |
| § 2081. Mode of assessment. | § 2094. Limitation of amount of assessment. |
| § 2082. Same—land in bulk or separate lots or parcels. | § 2095. Same—costs and expenses included. |
| § 2083. Same—division of improvements into parts. | |

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| § 2096. Same—what may not be included. | § 2100. Same—jurisdiction of court. |
| § 2097. Confirmation, correction, revision and setting aside of assessment. | § 2101. Same—evidence. |
| § 2098. Same—nature of proceedings—notice. | § 2102. Same—judgment. |
| § 2099. Same—by court—petition or application. | § 2103. Same—conclusiveness of judgment. |
| | § 2104. Assessment record. |
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VI. THE LIEN.

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| § 2107. Same—steps require to perfect. | § 2109. Same—duration and discharge. |
| | § 2110. Same—order of priority. |

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| § 2112. Defects and irregularities affecting validity of assessment. | § 2120. Same—acquiescence. |
| § 2113. Failure to advertise for bids for work. | § 2121. Same—by petitioning for improvement. |
| § 2114. Legal existence of street or way improved. | § 2123. Same—by payment or part payment. |
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I. NATURE, CONSTITUTIONAL RESTRICTIONS AND POWER TO LEVY.

§ 2017. Nature of special assessment or taxation.

Local assessments are levied in the exercise of the sovereign power of taxation.¹

¹ California. *Los Angeles Olive Growers' Assn. v. Pozzi*, 167 Cal. 450, 140 Pac. 581.

Indiana. *Buckingham v. Kerr* (Ind. App.), 120 N. E. 422; *Darby v. Vinnedge*, 53 Ind. App. 525, 100 N. E. 862, 865.

Maine. *Auburn v. Paul*, 110 Me. 192, 85 Atl. 571.

Missouri. *McGhee v. Walsh*, 249 Mo. 266, 284, 155 S. W. 445; *Parker-Washington Co. v. Corcoran*, 150 Mo. App. 188, 129 S. W. 1031.

Maryland. *Baltimore v. Cahill*, 126 Md. 596, 95 Atl. 473.

New Mexico. *Roswell v. Bateman*, 20 N. Mex. 77, 146 Pac. 950.

Tennessee. *Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796.

"In levying an assessment for a local improvement, the city is not acting under authority of any eminent domain statute, but such assessment, while not strictly speaking a tax, is in the nature of a tax, and the power to levy it is derived by the municipality, under its sovereign power of taxation." *Re Harrison St.*, 74 Wash. 184, 133 Pac. 8.

Condemnation and assessments.

"This is no less true because the assessment was levied by a proceeding supplemental to an eminent domain proceeding. It was nevertheless levied to pay for the acquiring of land to widen a public street, and has the same legal sanction as any other local assessment based upon benefits to the property charged. We have had occasion to recognize this separateness of the assessment branch of the proceeding from the condemnation branch of the proceeding though they are both prosecuted together in the Superior Court." *Carstens & Earles v. Seattle*, 84 Wash. 88, 146 Pac. 381, 384.

Police power. Assessments for the construction of sidewalks involves not the exercise of the taxing, but rather of the police power. The public need not necessarily establish that the property assessed was peculiarly benefited by the improvement. *Canton Borough v. Williams*, 67 Pa. Super. Ct. 239.

Assessment for sewers as an exercise of the police power. *Rogers*

Local assessments or special taxes are distinguished from general taxes.² A local assessment is not usually regarded as a tax as that term is employed in constitutions.³

v. Salem, 61 Or. 321, 122 Pac. 308, 312.

² *Detroit v. Weil*, 180 Mich. 593, 147 N. W. 550; *Arnold v. Knoxville*, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. (N. S.) 837, and note, 5 Ann. Cas. 881; *Adams Co. v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155 and note.

General taxes and special assessments. "At the outset it may be said that, like general taxes, special assessments are enforced proportional contributions, imposed at regularly recurring periods to provide a continuous revenue, but instead are levied only occasionally as required; they are imposed not upon the general body of citizens, but upon a limited class of persons who are interested in a local improvement, and who are assumed to be benefited by the improvement to the extent of the assessment; they are imposed and collected as an equivalent, actual or presumed, for the benefit, and to pay the cost of the improvement. Special assessments proceed upon the theory that when a local improvement enhances the value of the neighboring property, it is reasonable and competent for the legislature to provide that such property should pay for the improvement. In a general levy of taxes, a contribution is exacted in rate for the general benefits of government; in special assessments, the contribution is exacted because the property of the tax-

payer is considered by the legislature to be benefited over and beyond the general benefit of the community." *Alley v. Muskogee*, 53 Okl. 230, 156 Pac. 315.

³ *Wickliffe v. Greenville*, 170 Ky. 528, 186 S. W. 476; *Vogt v. Oakdale*, 166 Ky. 810, 179 S. W. 1037.

Assessment not a tax. "It is definitely settled in the authorities of this state that an assessment of the kind under consideration is not a tax within the meaning of our state constitution. It is merely a special assessment that may be authorized to the extent that the property is benefited by the improvement." *Eubank v. Ft. Worth* (Tex. Civ. App.), 173 S. W. 1003.

Special assessments are not taxes within the meaning of constitutional and statutory tax exemption provisions. *Kalispell v. School District*, 45 Mont. 221, 122 Pac. 742.

General taxation and special taxation or local assessments distinguished. "The accepted doctrine is that special assessments for local improvements, while, in a broad sense, referable to the taxing power, are not taxes for public purposes or taxes at all within the purview and the sense of the constitutional provision invoked or within the sense and purview of other sections of the article on revenue and taxation. The question, in one or another phase, has been here often and, it is believed,

In the exercise of the power, a personal liability is not usually imposed.⁴

has been judicially approached from every conceivable angle, always with the one result already announced. That respondent's eminent counsel has inadvertently led our esteemed and learned brethren of the St. Louis Court of Appeals into error in supposing that a construction of § 3, article 10, of the Constitution is involved in this case, becomes plain from the standpoint of both precedent and reason by consulting an unbroken line of cases beginning at least as early as 1856 and extending down to our last delivery in Banc, as the following cases verify: *Lockwood v. St. Louis*, 24 Mo. 20; *Garratt v. St. Louis*, 25 Mo. 505; *Newby v. Platte County*, 25 Mo. 258; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 498 et seq.; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *St. Louis v. Allen*, 53 Mo. 44, 52 et seq.; *Farrar v. St. Louis*, 80 Mo. 379, 386 et seq. (where the authorities up to that date are collated and considered); *Adams v. Lindell*, 5 Mo. App. 197, 212 et seq., 72 Mo. 198; *St. Joseph v. Owen*, 110 Mo. 445, 454 et seq., 110 Mo. 445, 19 S. W. 713; *Independence v. Gates*, 110 Mo. 374, 380 et seq., 110 Mo. 374, 19 S. W. 728; *Keith v. Bingham*, 100 Mo. 300, 306, 13 S. W. 683; *Lamar W. & E. L. Co. v. Lamar*, 128 Mo. 188, 218 et seq., 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157; *Kansas v. Bacon*, 147 Mo. 259, 282, 48 S. W. 860; *Heman v. Allen*, 156 Mo. 534, 546 et seq., 57 S. W. 559; *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 554 et seq., 58 S. W. 934;

Meier v. St. Louis, 180 Mo. 391, 408, 79 S. W. 955; *Heman Construction Co. v. Wabash Railroad Co.*, 206 Mo. 172, 179, 104 S. W. 67; *Fruin-Bambrick Construction Co. v. St. Louis Shovel Co.*, 211 Mo. 524, 531 et seq., 111 S. W. 86; *Board of Commissioners, etc., v. Peter*, 253 Mo. 520.

"In those cases (some in one and some in another) the definition of taxes in a constitutional sense is laid down, the inherent difference between a public tax levied as an impost for governmental purposes and a special assessment for a mere local improvement is pointed out and established, the constitutional provision in judgment here is construed on the reason and philosophy of the matter against its application to special benefit assessments, and the question in hand is foreclosed once for all. We will not reopen it in order to take jurisdiction at this late day. *Stare decisis*." *Ranney v. Cape Girardeau*, 255 Mo. 514, 518, 519, 164 S. W. 582, per Lamm, J.

Tax in its broad meaning includes both general taxes and special assessments. And to sustain an act it was held to include special assessments. *Los Angeles County Flood Control District v. Hamilton*, 177 Cal. 119, 169 Pac. 1028, 1032. See *Wagner v. Baltimore*, 239 U. S. 207, 36 Sup. Ct. 66, 60 L. ed. 230; *Yeatman v. Crandall*, 11 La. Ann. 220; *Dailey v. Swope*, 47 Miss. 367.

4 Personal liability. "In those states where assessments for im-

§ 2018. Same—theory is benefit conferred.⁵

“It is now well settled in most jurisdictions that adjacent property may be specially assessed to defray, in

provements are limited to benefits conferred, the authorities are conflicting on the question whether an assessment may be constitutionally imposed upon an owner of property benefited which may be collected out of any of his property generally; the theory of the cases denying the power that such assessments are purely in the nature of a local tax for a local improvement, and that to ascertain the liability of the owner beyond the value of the lot benefited (upon which a lien may be lawfully imposed) is to burden him with the payment for a benefit in which a property owner generally participates. In other words, that the property of the owner not especially benefited by the local assessment is affected by the improvement only, as is the property of all other members of the community, and that as to it there is no sound reason for a discrimination in imposing the burden of the assessment. * * *

In our own state, however, a contrary view has been expressly adopted and the power of the legislature to impose a personal liability in such cases is expressly upheld.” *Eubank v. Ft. Worth* (Tex. Civ. App.), 173 S. W. 1003.

⁵ *Alabama. Tuscaloosa v. Hill*, 194 Ala. 559, 69 So. 598, citing § 2018, vol. 5, ante (McQuillin, Mun. Ord. § 522).

Illinois. Kankakee v. Illinois Central R. Co., 257 Ill. 298, 100 N. E. 996.

Maryland. Maryland Trust Co. v. Baltimore, 125 Md. 40, 93 Atl. 454.

Massachusetts. Hester v. Thompson, 217 Mass. 422, 105 N. E. 631.

Michigan. Cote v. Highland Park, 173 Mich. 201, 139 N. W. 69.

New Hampshire. Granite State Land Co. v. Hampton, 77 N. H. 179, 89 Atl. 842.

Oklahoma. Rawlins v. Warner-Quinlan Asphalt Co. (Okla.), 174 Pac. 526; *Tulsa v. McCormick (Okla.)*, 164 Pac. 985.

Oregon. Schmid v. Portland, 83 Or. 583, 163 Pac. 1159, 1162.

Property not benefited cannot be assessed. *Boleom Mills v. Seattle*, 94 Wash. 583, 162 Pac. 1010.

Whether the public benefits assessed were out of proportion with the assessment levied against private property is not a question subject to review. *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946, citing *Peoria v. Smith*, 232 Ill. 561, 83 N. E. 1161.

Legislative determination of benefits. Where “the improvement is one that may specially benefit the property upon which the assessments are made, the legislative determination of the question of benefits should be regarded as conclusive.” *Bassett v. Ocean City*, 118 Md. 114, 84 Atl. 262, 264, approving *Cooley on Taxation* (3rd ed.), vol. 2, p. 1208, and *Cooley’s Const. Lim.* (6th ed.), p. 624; *Leser v. Wagner*, 120 Md. 671, 87 Atl. 1040, 1043.

“The rule deducible from read-

whole or in part, the cost of local improvements by which such property is especially benefited. That doctrine is based for its final reason on enhancement of values.”⁶

Special assessment or special taxation, therefore, is lawful and constitutional only when founded upon special benefits accrued from the improvement for which

ing the authorities is that it is within the province of the legislature to say that the real estate alone shall be subject to such a special assessment for the reason that special benefits accrue almost exclusively to land, so that generally, in works commonly classed as ‘internal improvements,’ the real estate alone has been taxed; and that the legislative authority, either of the state or, when properly authorized, of the municipality may determine over what territory the benefits are so diffused as to render it proper to make all lands contribute to the cost. The legislature having conferred the power on the city by the local act in question to determine uniformity of the real estate in the city is benefited by the proposed improvement; their determination of the area benefited is final and conclusive, in the absence of fraud, or unless the absence of benefit makes it manifest that the burden amounts to spoliation and not taxation.” *Detroit v. Weil*, 180 Mich. 593, 147 N. W. 550.

Benefits is a legislative question. *Newman v. Warner-Quinlan Asphalt Co.* (Okla., 1918), 177 Pac. 375.

⁶ *Cote v. Highland Park*, 173 Mich. 201, 139 N. W. 69.

Statutes require special assessments to be levied in proportion to the benefits conferred. *Robertson*

Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249.

Assessments for condemnation proceedings shall not exceed benefits. *Dallas v. Atkins* (Tex. Civ. App.), 197 S. W. 593.

“The sole ground for imposing a part or all of the cost of a public improvement upon one part of a municipality is that the part burdened with the cost receives corresponding benefits, which the general public does not receive.” *German Lutheran Ch. Soc. v. Mt. Clemens*, 179 Mich. 35, 146 N. W. 287, 289.

“Assessments cannot exceed the benefits to be derived from the improvement, and the theory sustaining such levies is that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which as one of the community, he receives in all public improvements to the precise extent of the assessment.” *Kuick v. Grand Rapids*, 200 Mich. 582, 166 N. W. 979, 981.

Charter specifically provides that “no part of the cost of the improvement shall be assessed against any owner of property in excess of the proposed benefits thereto in enhanced value thereof arising from the improvement, etc.” “This is but a specific declaration of a doctrine firmly established by our Supreme Court in *Hutchenson v. Storrie*, 92 Tex. 685,

the tax or assessment is laid.⁷ "The test in all special assessment proceedings is that the assessment should not exceed the special benefit to the property."⁸

§ 2019. Constitutional restrictions.⁹

Obviously local assessment or special taxation laws cannot ignore constitutional restrictions or guarantees,

51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884, following a decision of the United States Supreme Court in the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct., 187, 43 L. ed. 443." *Rudolph S. Blome v. Herd* (Tex. Civ. App.), 185 S. W. 53, 59.

Each property owner in a sewer district need not be benefited by each sewer construction, since sewers may be constructed at different times. *McGhee v. Walsh*, 249 Mo. 266, 155 S. W. 445.

"The special benefits accruing to the land affected is regarded in law as just compensation for the amount levied and collected as an assessment." *Indianapolis v. Bryan* (Ind. 1919), 125 N. E. 38; *Wright v. House* (Ind. 1919), 121 N. E. 433; *Harmon v. Bolley* (Ind. 1918), 120 N. E. 33, 2 A. L. R. 609.

⁷ *Haggart v. Alton*, 29 S. D. 509, 137 N. W. 372, 375.

⁸ *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946.

"It is established that under our Constitution special assessments upon property to defray the cost of local public improvements as distinguishable from the general tax levy, are permissible only when based on special and peculiar benefits to the property from the expenditure on account of which the assessment is laid and that

they are illegal if in substantial excess of such benefits." *Sayles v. Pittsfield Board of Public Works*, 222 Mass. 93, 109 N. E. 823.

"Taxation by special assessments is defensible only upon the theory of corresponding special benefits to the property assessed." *Horton Inv. Co. v. Seattle*, 95 Wash. 556, 162 Pac. 989, quoting from *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754, 757.

"These assessments are levied upon the theory of a special benefit to the property assessed by reason of the improvement. The city not only assumes a benefit to the property, but fixes and by proper proceedings levies the amount of that benefit against property, and when the owner pays the assessment as, in contemplation of law, paying for a benefit to his property." *Re Harrison St.*, 74 Wash. 184, 133 Pac. 8.

⁹ *Re Nagy Street*, New York City, 164 N. Y. S. 537, 99 Misc. Rep. 314.

Laws authorizing are constitutional. *Alley v. Muskogee*, 53 Okl. 230, 156 Pac. 315; *Anderson v. Ocala*, 67 Fla. 204, 64 So. 779.

Law exempting cemetery associations organized in the laws of the state "from all public taxes

as due process of law, equal protection of the laws, or permit taking private property without just compensation.¹⁰

and assessments," held constitutional. *Re Magnolia Street Sewer*, St. Paul, 134 Minn. 441, 159 N. W. 962.

"When statutes have long been treated by the courts as constitutional, and important rights have been based thereon, the courts may thereafter refuse to consider their constitutionality." *Van Nada v. Goedde*, 263 Ill. 105, 104 N. E. 1072, 1075; *Richter v. Burdoek*, 257 Ill. 410, 100 N. E. 1063; *Gregory Printing Co. v. De Voney*, 257 Ill. 399, 100 N. E. 1066.

Statute permitting municipal authorities to be the final arbiters as to what proportion of the cost of the improvement should be taxed against the public is not in conflict with the constitution. If it leads to gross inequalities in taxation, the matter should be presented to the legislature, since the court cannot pass upon the wisdom, or unwisdom of the statute on this point unless it contravenes some constitutional principle. *Ottawa v. Colwell*, 260 Ill. 548, 103 N. E. 573, 575.

Afton v. Gill, 57 Okl. 36, 145 Pac. 398, holding that law authorizing assessments against property for a lateral sewer conformed to the constitution.

Regardless of defects, authority to begin the proceedings anew may be conferred. *Phipps v. Medford*, 81 Or. 119, 158 Pac. 666, 81 Or. 119, 156 Pac. 787.

10 "Due process of law." *Bassett v. Ocean City*, 118 Md. 114,

84 Atl. 262, 264, 265; *Granite State Land Co. v. Hampton*, 77 N. H. 179, 89 Atl. 842; *West Hartford v. Coleman*, 88 Conn. 78, 89 Atl. 1120.

Notice and hearing to property owners. *Mansur v. Polson*, 45 Mont. 585, 125 Pac. 1002.

"Present, notice and opportunity to be heard before the board of public works as was given to the plaintiffs by the tribunal having in hand the duty of ascertaining the facts and acting in the matter leading up to and in the special assessment procedure, there is also present that 'due process of law,' required" by the constitution. *McGhee v. Walsh*, 249 Mo. 266, 284, 155 S. W. 445.

Failure to provide for notice and hearing of owners of property to be taxed renders law unconstitutional. *Bouslog v. Gulfport*, 112 Miss. 184, 72 So. 896.

Contra. Law which does not expressly provide for notice and hearing to the owners of property affected is not unconstitutional. "The authorities on this subject are not altogether uniform; but the great majority of them support what we regard as the more reasonable doctrine that legislation conferring authority to do an act, which to be constitutional lawfully requires notice and opportunity for a hearing to persons whose rights may be adversely affected, is not void for lack of express provision in it for such notice and opportunity, and that such authority may be

Such laws must not permit the exactions to exceed the benefits.¹¹

exercised upon the giving of the required notice and opportunity." *West Hartford v. Coleman*, 88 Conn. 78, 89 Atl. 1120.

Council may determine the value of property to be assessed without notice to the property owners, where such determination is only prima facie evidence of value and where property owners have notice of proceedings. Due process of law is not thus ignored. *Durst v. Des Moines*, 164 Iowa 82, 145 N. W. 528.

Consent of the owners of property affected. Validating acts of an improvement district by statute, held not to violate the constitution requiring the consent of a majority in value of property owners to the improvement. *Cotten v. Hughes*, 125 Ark. 126, 187 S. W. 905.

¹¹ *Hester v. Thompson*, 217 Mass. 422, 105 N. E. 631.

An ordinance permitting arbitrary difference in the assessments, irrespective of benefits, is unconstitutional. *Tulsa v. McCormick* (Okl.), 164 Pac. 985, following *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 240 U. S. 55, 36 Sup. Ct. 254, 60 L. ed. 523.

Law must not permit assessment to exceed benefit. A law which provides that special taxes to cover the cost of the improvement shall be assessed on all lots "to the extent of the special benefit to such lots," "that is, the cost and expense of all local improvements shall be payable by the real estate benefited to the extent of the improvements by the same is constitu-

tional." *Weise v. South Omaha*, 100 Neb. 492, 160 N. W. 890.

"A statute which limits the property that may be assessed to pay for building a sewer to the property specially benefited, and the assessment that may be made on such property to its fair share of the cost of improving it is not open to the objection that it permits the making of an unequal assessment." *Granite State Land Co. v. Hampton*, 77 N. H. 179, 89 Atl. 842, 844, approving *White v. Grove*, 183 Mass. 333, 67 N. E. 359.

Statutes which fix no standard but leave it to the discretion of others to assess in such proportions as they deem just and equitable are invalid. But statutes authorizing assessments according to benefits conferred upon the property assessed are not subject to the objection because the property to be assessed is designated and the standard of assessment is fixed. The burden is to be borne by the property benefited according to the benefits received. *Auburn v. Paul*, 110 Me. 192, 85 Atl. 571.

"No plan should be adopted which will result in gross equality of taxation. The burden should be apportioned as uniformly and equally as may be. The legislature cannot fix, or authorize the governing body of a municipality to fix, an arbitrary basis for an assessment to be imposed upon property without regard to benefits. If this be done, the principle which justifies special assessments on abutting property, namely, that it

Although there may be no special constitutional provisions restraining the exercise of legislative power in enacting laws which make provision for ascertaining what property is distinctively and specially benefited by local improvements and directing how the benefits shall be apportioned, such laws must be within the limit of the principle on which the doctrine is founded. "By that limit such assessments must be laid and apportioned by the rule of enhanced values and reasonable equality. Provisions of law which make it legally impossible for the assessing officers to apportion the burden of such improvements according to benefits and with proximate equality are said to be 'arbitrary exactions and not a legitimate exercise of legislative authority.' " ¹²

is thereby specially and particularly benefited, is wholly ignored. There can be no justification for any proceeding which charges the land with an assessment greater than the benefits." *German Lutheran Ch. Soc. v. Mt. Clemens*, 179 Mich. 35, 146 N. W. 287, 289.

"All agree that the only legal basis for assessments of this kind is the special benefits conferred by the improvements involved, and that special benefits are such as a landowner receives therefrom in excess of the benefits enjoyed by the general public. That the act authorizing the assessment must itself, either in express terms or by fair implication, fix the legal standard to which the assessment must be made to conform, was established by *Barnes v. Dyer*, 56 Vt. 469. It was therein held that an act providing for an assessment for such part of the expense incurred as the authorities should deem 'just and equitable' was insufficient and unconstitutional. The act under consideration provides

for an assessment for the landowner's 'just share' of the expense. These words, like those in *Barnes v. Dyer*, fail to establish a legal standard by which to determine the validity of an assessment. And this is so because they do not import, with reasonable certainty, a limitation to the special benefits conferred. The act falls short of constitutional requirements in this regard, and affords no basis for the assessment." *Corliss v. Richford*, 85 Vt. 85, 81 Atl. 234.

¹² Assessments in excess of benefits is taking property without due process of law. *Rudolph S. Blome Co. v. Herd* (Tex. Civ. App.), 185 S. W. 53; *Cote v. Highland Park*, 173 Mich. 201, 139 N. W. 69, 71.

Benefit districts authorized. *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 159 Mo. 153, 168 S. W. 687, reversed in 240 U. S. 55, 36 Sup. Ct. 253, 60 L. ed. 523. *Fitzgerald v. Sattler*, 102 Neb. 665, 168 N. W. 599, holding law authorizing council to establish a paving district in which to levy

Nor can such laws dispense with any constitutional requirements necessary to authorize such burdens. But it is competent to enact laws whose object is to afford relief from technical objections, that is, to guard against assessments being set aside for mere errors of form or technical irregularities or defects, but of course, they cannot deny redress in event of substantial error.¹³

§ 2020. Same—double taxation and equal protection of the law.¹⁴

§ 2021. Same—uniformity and equality.

The late cases support the general proposition, settled by earlier decisions, that the constitutional requirement of equality and uniformity of taxation has no application to assessments for local improvements.¹⁵

special assessments on property therein benefited by local improvements, on a three-fourths vote of its members, without a petition of the owners of property affected, constitutional.

“Due process of law” as affected by reasonableness in establishing a sewer district. *McGhee v. Wa'sh*, 249 Mo. 266, 289, 155 S. W. 445.

¹³ *Young v. Wenz*, 218 N. Y. 329, 113 N. E. 334, reversing 151 N. Y. S. 1151, 166 App. Div. 937.

Reassessment. Laws authorizing a new or reassessment where the first has been declared void are generally sustained as constitutional. *Weise v. South Omaha*, 100 Neb. 492, 160 N. W. 890. See § 2128, post; § 2128, vol. 5, ante.

Limitation or bringing action to question validity of assessment based upon the alleged fraud of city officers and the contract or in the performance of the work, held constitutional. *Chickasha v.*

O'Brien (Okla.), 159 Pac. 282, 286-289.

¹⁴ Double taxation, denied. *Shuey v. Trapp*, 166 Ky. 696, 179 S. W. 578.

Ordinance construed as not providing for a double pavement, and, hence, double taxation. *Benton v. Blake*, 263 Ill. 358, 104 N. E. 1040.

Assessments upon the same corner lot for similar improvements made upon two streets bordering its front and side lines are not double taxation. *Durst v. Des Moines*, 164 Iowa 82, 145 N. W. 528, 532.

Assessment for change of grade, and another for street improvement, held not double, because they constitute distinct benefits. A double assessment results where two assessments are made for the same benefit. *Spokane v. Onstine*, 86 Wash. 4, 149 Pac. 1.

¹⁵ *Arkansas. White v. Loughborough*, 125 Ark. 57, 188 S. W. 10.

But, as clearly stated by Judge Cooley, "Whatever may be the basis of the taxation, the requirement that it shall be uniform is universal. It applies as much to these local assessments as to any other species of taxes. The difference is only in the character of the uniformity, and in the basis on which it is established."¹⁶

Therefore, laws of this nature which discriminate unjustly between owners of property required to pay, in whole or in part, for the improvement, or which permit arbitrary differences, ignoring reasonable classification, plainly violate legal and constitutional standards.¹⁷

Kentucky. *Vogt v. Oakdale*, 166 Ky. 810, 179 S. W. 1037.

Michigan. *Detroit v. Weil*, 180 Mich. 593, 147 N. W. 550; *Loomis v. Rogers*, 197 Mich. 265, 163 N. W. 1018.

Minnesota. *Williams v. St. Paul*, 123 Minn. 1, 142 N. W. 886.

Missouri. *Ranney v. Cape Girardeau*, 255 Mo. 514, 164 S. W. 582; *Loth v. St. Louis*, 257 Mo. 399, 165 S. W. 1023.

New York. *Re Newkirk Ave.*, New York City, 146 N. Y. S. 216, 84 Misc. Rep. 615.

Oklahoma. *Block v. Patrick*, 35 Okl. 408, 130 Pac. 588; *Riley v. Carico*, 27 Okl. 33, 110 Pac. 738; *Jones v. Holzapfel*, 11 Okl. 405, 68 Pac. 511.

Washington. *Seattle v. Gratton*, 76 Wash. 401, 136 Pac. 488.

¹⁶ Cooley's Const. Lim. (7th ed.), p. 718.

"Uniformity and equality of burdens require that the same system of apportionment, whichever it may be, should govern all cases." *Wickliffe v. Greenville*, 170 Ky. 528, 186 S. W. 476.

¹⁷ See § 2019, ante.

Must be equitably proportioned.

Madison County v. Winterset, 164 Iowa 223, 145 N. W. 492.

Assessments must be distributed with substantial equality where the property is of like kind and its situation is similar. *Re Eighth Ave., Northwest*, 77 Wash. 570, 138 Pac. 10.

An assessment which is arbitrary and disproportionate to the benefits, is invalid. *Seattle v. Puget Traction, L. & P. Co.*, 91 Wash. 567, 158 Pac. 252, 254.

Law cannot discriminate between owners of property required to pay; laws should be so construed and applied as to obviate discrimination. *Tapp v. Johnson*, 174 Ky. 532, 192 S. W. 504.

Ordinance allowing arbitrary difference in assessments, is unconstitutional. *Tulsa v. McCormick (Okl.)*, 164 Pac. 985, 987, relying on *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 240 U. S. 55, 36 Sup. Ct. 254, 60 L. ed. 523.

If the effect of a law is to create an arbitrary and unreasonable exemption from taxation, ignoring proper classification, it is unconstitutional, e. g., a law discriminating between property owners in

To be valid and constitutional the special assessment or tax must be fairly within the limits of the benefits conferred,¹⁸ and just and uniform throughout the assessment, benefit or taxing district, or applicable alike to those compelled to pay who are similarly situated.¹⁹

laying assessments for local improvements. *Baltimore v. Cahill*, 126 Md. 596, 95 Atl. 473.

The constitutional provision requiring all taxation to be equally uniform controls special assessments and special taxation within taxing districts. The declaration that "all taxes shall be equal and uniform," embodies a general rule or principle applicable alike to every form of taxation, whether it be special taxation or assessment of contiguous property for local improvements, or taxation for general corporate purposes. This provision is not a grant of power to the legislative branch of the government but is the limitation upon legislative power expressly granted by other provisions of the constitution. *Haggart v. Alton*, 29 S. D. 509, 137 N. W. 372, 375.

Exemptions. Failure to assess county property for local improvements, held not an unconstitutional discrimination. *Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796.

There is no inequality in exempting church property. "Property used for public purposes, cemeteries and actual places of religious worship and other exempted property are taken out of the things liable to assessment. The equality which is to be maintained is as to those who are liable and against them the assessment must be equally charged." *Schuylkill Haven*

Borough v. Trinity Church, 62 Pa. Super. Ct. 413.

Flat rate of assessment rather than the zone rate in a district of one mile in radius, sustained, as not inequitable and unjust. *Re Public Playgrounds*, New York City, 157 N. Y. S. 991, 93 Misc. Rep. 289.

Law providing for joint park districts for two or more municipalities, held not violative of the constitution requiring the legislature "to provide by law for a uniform and equal rate of taxation," since the act prescribes a mode of creating such districts "by neighboring towns and cities under regulations applying to all citizens of the state similarly situated." *Brown v. Baltimore & O. & C. R. Co.*, 186 Ind. 81, 115 N. E. 86, 88.

¹⁸ Sections 2018, 2019, ante; §§ 2018, 2019, vol. 5, ante.

Property shall not be assessed "more or less than its proportionate share of the costs of the improvement. *Re Eighth Ave.*, *Seattle*, 77 Wash. 570, 138 Pac. 10.

¹⁹ See § 2019, ante. A special assessment is valid if it is within the limits of benefits conferred and is just and uniform throughout the assessment district. *Loomis v. Rogers*, 197 Mich. 265, 163 N. W. 1018.

While a city may adopt one of several plans of assessment provided by the law, it must follow the same plan in all cases. "Uniformity and equality of burdens

§ 2022. Power to levy assessments.

As a municipality is without inherent power to levy special assessments or taxes for local improvements,

require that the same system of apportionment, whichever it may be, should govern all cases." *Wickliffe v. Greenville*, 170 Ky. 528, 186 S. W. 476.

Constitution does not require that special assessments be laid in proportion to benefits, or in proportion to a cash valuation, but merely that they "be uniform upon the same class of subjects." *State v. Ely*, 129 Minn. 40, 151 N. W. 545.

An assessment is not invalid because it does not result in exact equality and fairness to every landowner. Some inequalities and injustices are likely to result. The law does not require of the public authorities the unattainable. *Moore v. Paving Improvement District*, 122 Ark. 326, 193 S. W. 766, 768.

"Under former Constitutions in this state all taxes were required to be uniform as to persons and property within the jurisdiction imposes the same. This rule obtains now, except as to special taxes and special assessments. *Loeffler v. City of Chicago*, 246 Ill. 43, 92 N. E. 586, 20 Ann. Cas. 335. It has been held by this court that so far as practicable it was the intention of the framers of the Constitution to preserve the rule of uniformity in making local improvements, and all property should be taxed that was similarly situated with respect to a proposed improvement. *Kuekner v. City of Freeport*, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774. This principle of uniformity and equality, however,

applies only to the property benefited by the local improvement and not to other property in the municipality. *Davis v. City of Litchfield*, supra; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69. The only property that the rule applies to is that which is assessed. If any other property is benefited, the court, on a hearing, has the power of recasting the roll and having it assessed." *Ottawa v. Colwell*, 260 Ill. 548, 103 N. E. 573, 575.

Discrimination condemned. In the case of a square bounded by principal streets, the land might be assessed half way back from the improvement to the next street. But if the land is of such character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionally to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact.

"The city of St. Louis is shown by this case and by others in the Missouri reports to contain tracts not yet cut into city lots, extending back from streets without encountering a parallel street much farther than the distance within which paving could be supposed to be a benefit. See, for instance, *Gilsonite Roofing Co. v. St. Louis Fair Assn.*, 231 Mo. 589. *Granite Paving Co. v. Fleming*, 251 Mo. 210; *Loth v. St. Louis*, 257 Mo. 399; *Bush Construction Co. v. Withnell*, 185 Mo. App. 408. The ordi-

such power must originate by constitution, statute or charter.²⁰

nance, following the charter as construed, established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near five hundred feet when it encountered such a tract, and on the opposite side of the street was one hundred and fifty and two hundred and forty feet away. The differences were not based upon any consideration of difference in the benefits conferred but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendant's case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions not because of special considerations applicable to the parcel's taxed but in blind obedience to a rule that requires the result. And it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts." *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 240 U. S. 55, 59, 60, 36 Sup. Ct. 254, 60

L. ed. 523, reversing 259 Mo. 153, 168 S. W. 687, 36 Sup. Ct. 400.

²⁰ *State v. Indianapolis* (Ind. 1919), 123 N. W. 405; *Indianapolis v. Bryan* (Ind. 1919), 125 N. E. 38; *Collins v. A. Jaicks Co.* (Mo. 1919), 214 S. W. 391.

"The right of a city to impose and collect special assessments is derived from the sovereign power of the state. Without a statutory grant the power does not exist." *Indiana Union Traction Co. v. Gough*, 54 Ind. App. 438, 102 N. E. 453.

The power will not be inferred from a statute. *Wilt v. Bueter*, 186 Ind. 98, 111 N. E. 926, 929.

A municipality is without inherent power to levy special assessments for local improvements. Such power must have its origin in some statute providing therefor. *Des Moines City Ry. Co. v. Des Moines* (Iowa), 159 N. W. 450, 454.

"The power to levy an assessment for a local improvement exists only where it is expressly conferred by legislative authority." *Re Nagy Street, New York City*, 164 N. Y. S. 537, 544, 99 Misc. Rep. 314.

Power to assess county property must be expressly conferred since a county is but an arm of the state government. *Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796.

Power given to park commissioners. *South Park Comrs. v. Wood*, 270 Ill. 263, 110 N. E. 349.

Park district given power; fact improvement is partly within two

This power exists in the legislature²¹ and may be exercised directly or indirectly within the limits of the constitution, and therefore it may be delegated to municipalities,²² either in express terms, or by necessary implication,²³ to be exercised in good faith, substantially in the manner prescribed, and subject to all constitutional restriction, expressed and implied.²⁴ Unless re-

townships, and partly with a city and partly without, is of no importance, provided it was within the area of the park district. *Van Nada v. Goedde*, 263 Ill. 105, 104 N. E. 1072.

Assessment for the purpose of reimbursing a city for expenditures in improvements, denied. *Celaya v. Brownsville* (Tex. Civ. App.), 203 S. W. 153.

"Public improvements cannot be legally made specially burdensome upon private property, in the absence of legislative authorization and the prescribed method being followed in all substantial particulars." *Sales v. Hartford*, 161 Wis. 136, 152 N. W. 853, 855.

Cannot improve county road within municipal area by assessments unless it is a street in control of city, and county as agent of state, has surrendered jurisdiction thereover. *Cole v. Seaside* (Or. 1919), 182 Pac. 165.

²¹ "The power of the legislature to levy special taxes for local improvements, and to impose special assessments for road or street improvements, when not restricted by constitutional provisions, is well settled and is supported by numerous federal and state decisions." *Leser v. Wagner*, 120 Md. 671, 87 Atl. 1040, 1043.

²² *Alabama. Ragsdale v. Florence* (Ala. 1919), 81 So. 584.

Colorado. Delta v. Lamb, 55 Colo. 483, 136 Pac. 77.

Indiana. Indiana Union Traction Co. v. Gough, 54 Ind. App. 438, 102 N. E. 453.

Illinois. Winnetka v. Taylor, 288 Ill. 624, 124 N. E. 348.

Maryland. Leser v. Wagner, 120 Md. 671, 87 Atl. 1040; *Philadelphia B. & W. R. Co. v. Baltimore*, 121 Md. 504, 88 Atl. 263.

Maine. Auburn v. Paul, 110 Me. 192, 85 Atl. 571.

New York. Parker v. Wallace, 142 N. Y. S. 523, 80 Misc. Rep. 425.

New Jersey. Evans v. Paterson, 92 N. J. L. 621, 102 Atl. 904.

Washington. Re Harrison St., 74 Wash. 187, 133 Pac. 8.

North Dakota. Ellison v. Lamoure, 30 N. D. 43, 151 N. W. 988.

²³ *Woodring v. Straup*, 45 Utah 173, 143 Pac. 592.

²⁴ *Arkansas. Nakdimen v. Ft. Smith & Van Buren Bridge Dist.*, 115 Ark. 194, 172 S. W. 272.

California. Los Angeles Olive Growers' Assn. v. Pozzi, 167 Cal. 454, 140 Pac. 581.

Florida. Anderson v. Ocala, 67 Fla. 204, 64 So. 779.

Illinois. Van Nada v. Goedde, 263 Ill. 105, 104 N. E. 1072.

Indiana. Jeffersonville v. Louisville & Southern Ind. T. Co., 59 Ind. App. 237, 107 N. E. 748.

Iowa. Durst v. Des Moines, 164 Iowa 82, 145 N. W. 528.

stricted expressly or by implication this power is continuing, and is not spent by a single exercise.²⁵

§ 2023. Same—construction of power.²⁶

Power to make public improvements does not of itself

Kentucky. *Bayes v. Paintsville*, 166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027.

Louisiana. *Roth v. Thibodaux*, 137 La. 210, 68 So. 412.

Massachusetts. *Sayles v. Pittsfield Board of Public Works*, 222 Mass. 93, 109 N. E. 823.

Michigan. *Kalamazoo v. Perrin*, 194 Mich. 484, 160 N. W. 653.

North Dakota. *Ellison v. La-moure*, 30 N. D. 43, 151 N. W. 988.

New Mexico. *Roswell v. Bateman*, 20 N. Mex. 77, 146 Pac. 950.

North Carolina. *Marion v. Pilot Mountain*, 170 N. C. 118, 87 S. E. 53; *Justice v. Asheville*, 161 N. C. 62, 76 S. E. 822.

New York. *Parker v. Wallace*, 142 N. Y. S. 523, 80 Misc. Rep. 425.

Oklahoma. *Leatherman v. Ad-dington*, 37 Okl. 436, 132 Pac. 129; *Nitsche v. State Security Bank (Okl.)*, 170 Pac. 234.

Oregon. *Palmsberg v. Kinney*, 65 Or. 220, 132 Pac. 538; *Murray v. La Grande*, 76 Or. 598, 149 Pac. 1019.

Texas. *Celaya v. Brownsville (Tex. Civ. App.)*, 203 S. W. 153; *Eubank v. Ft. Worth (Tex. Civ. App.)*, 173 S. W. 1003; *Electric Park Co. v. San Antonio Baseball Ass'n (Tex. Civ. App.)*, 155 S. W. 1189.

Wisconsin. *Hoefer v. Milwaukee*, 155 Wis. 83, 143 N. W. 1038.

Washington. *Kuehl v. Edmonds*,

ington Water Power Co. v. Spokane, 89 Wash. 149, 154 Pac. 329.

Power to levy to be exercised by ordinance passed by two-thirds vote of the membership of the council. *Celaya v. Brownsville (Tex. Civ. App.)*, 203 S. W. 153.

Judicial opinions differ as to what defects, lapses, or divergence from method prescribed ought to be regarded as jurisdictional, and what are mere errors, irregularities, not affecting substantial rights, etc., where action is taken in good faith. *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173, 175, 176.

²⁵ *Bennett v. Winston-Salem South-Bound Ry. Co.*, 170 N. C. 389, 87 N. E. 133; *Wood v. Duke Land & Imp. Co.*, 165 N. C. 367, 81 S. E. 422; *Knickerbocker Co. v. Seattle*, 69 Wash. 365, 124 Pac. 922; *Spokane v. Onstine*, 86 Wash. 4, 149 Pac. 1.

Section 1830, ante; § 1830, vol. 4, ante; § 2038, vol. 4, ante.

²⁶ *Sales v. Hartford*, 161 Wis. 136, 152 N. W. 853; *Chicago Great Western Ry. Co. v. Council Bluffs*, 176 Iowa 247, 157 N. W. 947; *Schuylkill Haven Borough v. Trinity Church*, 62 Pa. Super. Ct. 413.

Construction of particular law as to extending sewer system, wherein the question of repeal was involved. *Harris v. Churchill*, 152 N. Y. S. 73.

85 Wash. 307, 148 Pac. 19; Wash- Assessment area. *Glasscock v.*

confer the power to levy and collect special taxes to defray the cost of such improvements.²⁷

In determining whether the power exists the law involved should be strictly construed,²⁸ and in case of fair

Larned, 103 Kan. 242, 173 Pac. 302.

Taxing district; what property included. Missouri, Kansas & Texas Ry. Co. v. Tulsa, 45 Okl. 382, 145 Pac. 398.

Construction of law where a continuous highway over streets of different names was paved, due to the physical conditions. McQueen v. Van Duesen, 189 Mo. App. 492, 176 S. W. 1057.

Particular law held not retrospective. Texarkana Special School Dist. v. Board of Improvement, etc., 127 Ark. 341, 191 S. W. 918.

That the legislature intended a statute relating to assessments should operate retrospectively will not be assumed in the absence of specific declaration to that effect. East Hoquiam Co. v. Hoquiam, 90 Wash. 210, 155 Pac. 754.

²⁷ May only exercise such power as conferred. Moundville v. Yost, 75 W. Va. 224, 83 S. E. 910.

Power to levy taxes for corporate purposes, to lay out, construct, pave and otherwise improve streets and power to enact ordinances and regulations to carry out the powers granted does not by implication confer power to pave streets by special taxation. Woodring v. Straup, 45 Utah 173, 143 Pac. 592.

Law authorizing streets to be "graded and paved," held that the statute did not empower municipal authorities to pass and enforce an ordinance for the grading of a street without paving it

and charge the abutting property with the cost of such improvement. Jasper v. Cassidy, 53 Ind. App. 678, 102 N. E. 278, relying on Taylor v. Patton, 160 Ind. 4, 66 N. E. 91.

"Power to levy special or local taxes for the maintenance of water works, reservoirs, canals, gas, electric or other plants for illumination and for constructing, extending and repairing sewers and drains and for constructing and paving of sidewalks, does not by implication authorize the imposition of such taxes for street paving." Woodring v. Straup, 45 Utah 173, 143 Pac. 592.

Law authorizing assessments for street improvements held not applicable to assessments for the construction of sidewalks. Northern Light Lodge v. Nonoma, 180 Iowa 62, 161 N. W. 78.

²⁸ California. Los Angeles Olive Growers' Assn. v. Pozzi, 167 Cal. 454, 140 Pac. 581.

Indiana. Buckingham v. Kerr (Ind. App.), 120 N. E. 422; Wilt v. Bueter, 186 Ind. 98, 111 N. E. 926, 929; Prevó v. Hammond, 186 Ind. 612, 116 N. E. 584, 586; Darby v. Vinneedge, 53 Ind. App. 525, 100 N. E. 862.

Iowa. Chicago Great Western Ry. Co. v. Council Bluffs, 176 Iowa 247, 157 N. W. 947; Kneebbs v. Sioux City, 156 Iowa 607, 137 N. W. 944.

Louisiana. Minden v. Glass, 132 La. 927, 61 So. 874.

and reasonable doubt the doubt should be resolved against the existence of the power.²⁹

In levying special assessments or taxes due observance of the applicable law is indispensable. All limitations expressed or implied therein must be strictly observed.³⁰

Where a statute prescribes the mode of exercising a power, the mode prescribed must be followed.³¹

Missouri. *Boatmen's Bank v. Semple Place Realty Co.* (Mo. App. 1919), 213 S. W. 900.

Maine. *Auburn v. Paul*, 110 Me. 192, 85 Atl. 571.

S. Dakota. *Pettigrew v. Sioux Falls*, 35 S. D. 78, 150 N. W. 772.

Tennessee. *Memphis v. Hill* (Tenn. 1919), 208 S. W. 613, 615.

Utah. *Woodring v. Straup*, 45 Utah 173, 143 Pac. 592.

W. Virginia. *Bonham v. Charleston* (W. Va. 1919), 100 S. E. 222.

"Authority given municipalities to impose taxes and special assessments for municipal improvements should be strictly construed, especially when it adversely affects the rights of property holders to be fully advised of the burdens to be put upon them; and any material departure from the express authority is fatal to the special assessment." *Gainsville v. McCreary*, 66 Fla. 507, 63 So. 914, citing § 2023, vol. 5, ante.

²⁹ *Prevo v. Hammond*, 186 Ind. 612, 116 N. E. 584, 586; *Wilt v. Bueter*, 186 Ind. 98, 111 N. E. 926, 929; *Missouri, K. & T. Ry. Co. v. Tulsa*, 45 Okl. 382, 145 Pac. 398.

"The general rule is that the power of a municipality to take or place a burden upon the property of a citizen must be conferred by an unambiguous statute before that power can be exercised; if there

be a fair and reasonable doubt as to the existence of such power, such doubt must be resolved in favor of the taxpayer and against the municipality." *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 168 S. W. 721.

Doubt resolved in favor of taxpayer. Rule applicable to an ordinance authorizing the assessment. *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 168 S. W. 721, 723.

³⁰ "The city must look to its charter for its power to levy its tax, and must abide by the limitations upon those powers which are expressed therein." Thus where different methods of levying special taxes in improving streets and boulevards are prescribed by municipal charter, a mere designation of a street as a boulevard does not make it a boulevard and authorizing the municipal corporation to treat it as such in levying special taxes for improvements thereon. *Albers v. St. Louis*, 268 Mo. 349, 358, 188 S. W. 83.

Proceedings are in invitum, and substantial compliance with controlling law is essential to validate. *Boonville v. Stephens*, 238 Mo. 339, 353, 141 S. W. 1111.

³¹ *Indianapolis v. College Park Land Co.* (Ind.); 118 N. E. 356; *Flanagan v. Tulsa*, 55 Okl. 638, 155 Pac. 542.

'All laws relating to the subject should be construed in harmony if this can be done.³²

§ 2024. Law must authorize improvement when made.

In Washington, although there was no law authorizing the original assessment, a reassessment can be made under a law subsequently passed. In that state, it seems the rule is, that the legislature can authorize a reassessment even when the work was ordered and done without any initial jurisdiction or power in the municipality.³³

§ 2025. Assessments for improvements already made.³⁴

Laws permit assessment for improvements already made; but in providing therefor it has been ruled in Illinois enough must be set out in the ordinance to indicate the general history of the improvement, and that the work had already been done in good faith under a former insufficient ordinance.³⁵

§ 2026. Authority to make improvement or expenditure.³⁶

If the city has been paid once for the improvement it

³² Price v. Board of Local Improvements, 266 Ill. 299, 107 N. E. 611.

³³ Nichols v. Spokane, 91 Wash. 235, 157 Pac. 863; Kuehl v. Edmonds, 91 Wash. 195, 157 Pac. 850; Eggerth v. Spokane, 91 Wash. 221, 157 Pac. 859.

³⁴ Belleville v. Miller, 257 Ill. 244, 100 N. E. 946.

A special tax can not be levied and collected to pay for a sidewalk by virtue of an ordinance adopted after the walk has been built. People v. Gray, 256 Ill. 479, 100 N. E. 171.

Particular law construed as retrospective and made to apply to

an improvement completed before the law was amended. Lincoln v. Harts, 266 Ill. 405, 107 N. E. 725.

Statute, held to have no application to a reassessment already made, as it would not be assumed that the legislature intended such result, in the absence of specific declaration to that effect. East Hoquiam Co. v. Hoquiam, 90 Wash. 210, 155 Pac. 754.

³⁵ People v. Gray, 256 Ill. 479, 100 N. E. 171, 173, holding ordinance insufficient.

³⁶ No authority. Walther v. Cape Girardeau, 166 Mo. App. 467, 149 S. W. 36.

Sidewalk placed on private prop-

cannot levy special assessments for the same improvement and be paid again.³⁷

II. KINDS OF IMPROVEMENTS FOR WHICH AUTHORIZED.

§ 2027. Purpose of special assessments—local improvements.

Laws recognize a distinction between public improvements which benefit the entire community, and those local in their nature which benefit particular real property or limited areas. The property benefited is usually required to pay the expense of the latter.³⁸

erty without authority; no recovery allowed. *Springfield v. Baxter*, 180 Mo. App. 40, 165 S. W. 366.

The local authorities designated must make the levy. *Auburn v. Paul*, 110 Me. 192, 85 Atl. 571.

Municipality is without jurisdiction unless it follows the mandatory provisions of the applicable law. *Hochfeld v. Portland*, 72 Or. 190, 142 Pac. 824.

If city has no jurisdiction of a county road passing through its limits, it cannot improve it at the expense of property owners. *Cole v. Seaside*, 80 Or. 73, 156 Pac. 569.

A street under the control of park commissioners cannot be paved by the municipality by special assessment against abutting property. *Fargo v. Gearey*, 33 N. D. 64, 156 N. W. 552.

Where a municipality lays a lateral sewer in a private alley as a part of its general sewer system, without first having acquired the right to do so by condemnation or otherwise under its corporate franchise, on the assumption that such alley was a public one, and the owner of the property possessing

full knowledge of its construction, made no objections or did not take any steps to prevent, he cannot thereafter complain. *Werninger v. Huntington*, 78 W. Va. 107, 88 S. E. 655, 657, citing § 2120, vol. 5, ante.

³⁷ *Re Shilshole Avenue*, 94 Wash. 583, 162 Pac. 1010, 1015, citing § 2026, vol. 5, ante.

Paving a street on private property without consent and warrant of law, held special assessments void. *Cahill v. Gill*, 130 Md. 495, 100 Atl. 834.

³⁸ Special assessments allowed only for improvements local in character as distinguished from general. *St. Cloud v. Carlson* (Fla. 1919), 82 So. 616, 618, citing § 2027, vol. 5, ante.

Local improvement distinguished from general. *Re Shilshole Ave*, 85 Wash. 522, 148 Pac. 781.

“Public utility” (street railway) and “local improvement work,” distinguished. *Jahn Contracting Co. v. Seattle*, 74 Wash. 298, 133 Pac. 458.

Local improvement illustrated. A drain or sewer not necessary to

A local improvement is a public improvement which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the improvement.³⁹

In Illinois, it has been uniformly held that the construction of a waterworks plant or an electric light plant is not a local improvement, but such plants are of general utility to the inhabitants of the municipality and must be paid for by general taxation.⁴⁰

the drainage system of a city, held not a local improvement to be paid for by local assessments. *Judge v. Bergman*, 258 Ill. 246, 101 N. E. 474, affirming 176 Ill. 42, and distinguishing *Chicago v. Green*, 238 Ill. 258, 87 N. E. 417.

Plan to widen and improve a street is a local improvement. *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543.

Sewer system as local improvement. *Bradley v. New York Central R. Co.*, 277 Ill. 608, 115 N. E. 640, 643, 644.

Sewer and septic tank held general and not local or public improvement for which special assessments could be made therefor. *Globe v. Willis*, 16 Ariz. 378, 146 Pac. 544.

Viaduct built over one of the main streets connecting two parts of the community, held not a local improvement. *Waukegan v. De Wolf*, 258 Ill. 374, 101 N. E. 532, 45 L. R. A. (N. S.) 918, Ann. Cas. 1914B, 538.

Mains and fire hydrants along the main streets, as part of waterworks, held not a local improve-

ment. *Grand Ridge v. Hayes*, 271 Ill. 431, 111 N. E. 289.

Widening a street is local. *Peoria v. Peoria Ry. Co.*, 274 Ill. 48, 113 N. E. 170.

³⁹ *Nakdimen v. Ft. Smith & Van Buren Bridge Dist.*, 115 Ark. 194, 172 S. W. 272, 274; *Shibley v. Ft. Smith & Van Buren Bridge Dist.*, 96 Ark. 410, 132 S. W. 444; *Crane v. Siloam Springs*, 67 Ark. 37, 55 S. W. 957.

"A local improvement has been defined to be a public improvement which by reason of it being confined to a locality, enhances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality. * * * This definition has not, perhaps, added very much to the words themselves." *Waukegan v. De Wolf*, 258 Ill. 374, 101 N. E. 532, quoting from *Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412.

"Local improvement" as used in constitution of Oklahoma. *Gilfilan v. Bartlesville (Ok.)*, 148 Pac. 1012.

⁴⁰ *Grand Ridge v. Hayes*, 271 Ill. 431, 111 N. E. 289.

Under particular laws, whether an improvement is local is said to be ordinarily a question of fact rather than one of law to be determined from its nature and object.⁴¹

§ 2028. Same—street improvements in general.⁴²

Assessments for street improvements must be limited as the law prescribes.⁴³

Whether sidewalks are included in general power to improve streets depends on the proper construction of the applicable law.⁴⁴

⁴¹ *Peoria v. Peoria Ry. Co.*, 274 Ill. 48, 113 N. E. 170, 172.

“What shall be considered a local improvement is a question that is usually committed, in the first instance, to the municipal authorities, subject to review by the courts.” *Mortell v. Clark*, 272 Ill. 201, 111 N. E. 993, 997, relying on *Waukegan v. De Wolf*, 258 Ill. 374, 101 N. E. 532, 45 L. R. A. (N. S.) 918, Ann. Cas. 1914B, 538, holding the nature of the improvement is decisive—whether the substantial benefits arising therefrom are local or general in their nature.

⁴² *Kentucky. Bayes v. Paintsville*, 166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027.

Missouri. Collins v. A. Jaicks (Mo. 1919), 214 S. W. 391; *Meyer v. Bobb*, 185 Mo. App. 685, 171 S. W. 600; *Meyer v. Goldsmith*, 185 Mo. App. 707, 171 S. W. 606.

S. Dakota. Pettigrew v. Sioux Falls, 35 S. D. 78, 150 N. W. 772.

Texas. Celaya v. Brownsville (Tex. Civ. App.), 203 S. W. 153.

W. Virginia. Moundsville v. Yost, 75 W. Va. 224, 83 S. E. 910.

⁴³ *Marret v. Jefferson County Const. Co.*, 161 Ky. 845, 171 S. W. 396.

Power to levy a special tax for

the constructing and paving of sidewalks does not authorize such tax for street paving. *Woodring v. Straup*, 45 Utah 173, 143 Pac. 592.

Authority to levy special taxes for waterworks, lighting and sewers is not authority so to pave streets. *Woodring v. Straup*, 45 Utah 173, 143 Pac. 592.

To “open” a street is to “lay out” a proposed street, which means “the adoption of outlines or locations and not the work of construction or improvement.” *Douglas v. Riffin*, 123 Md. 18, 22, 90 Atl. 1000.

The fact that there are liens on the highway improved will not preclude the levy of assessments. *Philadelphia v. Peters*, 62 Pa. Super. Ct. 90.

Reassessments law for street improvements, sustained. *Phipps v. Medford*, 81 Or. 119, 158 Pac. 666, 81 Or. 119, 156 Pac. 787.

Public road within the limits of a town, occupying the position of a street, may be improved by the town. *Letcher County v. Whitesburg*, 162 Ky. 604, 172 S. W. 1041.

⁴⁴ **Sidewalks included.** *Anderson v. Ocala*, 67 Fla. 204, 64 So. 779; *Bassett v. Baltimore*, 118 Md. 114,

§ 2029. Same—same—nature of street improvement.

The character of street improvements chargeable against property is usually specified in the law granting the power to make them.⁴⁵

84 Atl. 262; *Schultise v. Taloga*, 42 Okl. 65, 140 Pac. 1190; *Leatherman v. Addington*, 37 Okl. 436, 132 Pac. 129; *Marion v. Pilot Mountain*, 170 N. C. 118, 87 S. E. 53.

Power to curb, gutter and pave, includes power to relay a sidewalk on a grade fixed. *Re Allen*, 134 N. Y. S. 557, 74 Misc. Rep. 513.

Power to assess cost of constructing against land in front of sidewalks, does not embrace corner lots. *Kaynor v. Cedar Falls*, 156 Iowa 161, 135 N. W. 564.

Sidewalk; grading, extra drives and gutters held not authorized under particular law. *Newark Homebuilders v. Bernard Tp.*, 90 N. J. L. 361, 99 Atl. 130.

Imposing burden of cost of sidewalk grading to conform to changes in grade of street, denied. *Correll v. Mount Jewett Borough*, 49 Pa. Super. Ct. 118.

"Street" as to assessing part of cost for improving, held not to include sidewalks, but the roadway set apart for vehicles only. "The term 'street' has a broad meaning and a narrow meaning. In its broad sense it includes both the roadway for vehicles and the sidewalk for pedestrians. In its narrow sense it includes only the roadway for vehicles." *Re Ransom*, 149 N. Y. S. 1056, 87 Misc. Rep. 1.

⁴⁵ Georgia. *Waycross v. Tomberlin*, 146 Ga. 504, 91 S. E. 560.

Idaho. *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381.

Indiana. *Buckingham v. Kerr* (Ind. App.), 120 N. E. 422.

Iowa. *Hutchins v. Hanna* (Ia.), 159 N. W. 199.

Oregon. *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809.

Portion only of street may be improved. *Maysville v. Davis*, 166 Ky. 555, 179 S. W. 463.

Elevating a street. *Wing v. Macon*, 142 Ga. 382, 82 S. E. 1062; *Re Shilshole Ave.*, 85 Wash. 522, 148 Pac. 781.

Elevating street, to obviate high water. *Sanderson v. Seattle*, 95 Wash. 582, 164 Pac. 217.

Street paving includes costs for removal of hydrants, lamp posts, etc. *People v. Buffalo*, 137 N. Y. S. 464, 77 Misc. Rep. 532.

Street intersections, cost of, may be imposed on property abutting on the street improved. *Perry v. Albia*, 155 Iowa 550, 136 N. W. 681; *State ex rel. v. Chillicothe*, 237 Mo. 486, 141 S. W. 602.

Where the council may determine whether it would include or exclude the cost of street intersections when making an assessment for a street improvement, "it will not be prevented from levying special assessments for the improvement even though it has in the past paid for the same kind of an improvement by general taxation." *Colby v. Medford*, 85 Or. 485, 541, 167 Pac. 487; *Ladd v. Gambell*, 35 Or. 393, 400, 59 Pac. 113.

Bridge in a street may be constructed under power to improve

The mandatory provisions of the law must be followed. Under some laws, in a proceeding to condemn and open a street agreeably to a valid ordinance, the municipal corporation can not assess the benefits arising from grading the street.⁴⁶

§ 2030. Original construction, reconstruction and repairs.⁴⁷

Whether an improvement is an original construction,⁴⁸

streets, etc., by special assessments. *Knickerbocker Co. v. Seattle*, 69 Wash. 336, 124 Pac. 920.

Plank roadway, included in power to improve streets. *Knickerbocker Co. v. Seattle*, 69 Wash. 365, 124 Pac. 922.

"Tunnel," under particular law, held not part of street, nor included in power to construct, etc., streets. *Thompson v. Hance*, 174 Cal. 572, 163 Pac. 1021.

Tunnel constructed in or under a street, power to build, includes incidental things, as a sidewalk to make the tunnel available for public use. *Mardis v. McCarthy*, 162 Cal. 94, 121 Pac. 389.

⁴⁶ *Patterson v. Baltimore*, 130 Md. 645, 655 et seq., 101 Atl. 589.

"A street may be and often is opened and condemned many years before any steps are taken to pave it." *Dashiell v. Baltimore*, 45 Md. 615, 626.

"By the term opening we do not understand the improvement of a street or highway by grading, culverting, etc.; the term in general (we think always) clearly distinguishable from such kind of improvement. The term opening refers to the throwing open to the public what before was appropriated to individual use, and the re-

moving of such obstructions as exist on the surface of the street rather than any artificial improvement on the surface. And we think in the Charter this distinction is very clearly drawn." *Reid v. Toledo*, 18 Ohio 161.

⁴⁷ **Continuing power**, to what extent: §§ 1830, 2022, ante; § 1830, vol. 4, ante; §§ 2022, 2038, vol. 5, ante.

Maintenance for ten years of street means good road for that time, and is not repairs. *Mueller v. Hudson County Boulevard Comrs.*, 87 N. J. L. 702, 94 Atl. 84.

See § 1912, ante; § 1912, vol. 4, ante.

⁴⁸ **Original construction.** *Louisville v. Stoll*, 159 Ky. 138, 166 S. W. 811; *Kimbly v. Hickman*, 163 Ky. 713, 174 S. W. 484.

The construction of a street on a highway of territory legally annexed, is not a reconstruction but an original construction, and in Kentucky the property owner is liable for the cost. *Gernert v. Louisville*, 155 Ky. 589, 159 S. W. 1163; *Sparks v. Barber Asphalt Paving Co.*, 129 Ky. 769, 112 S. W. 830, 22 L. R. A. (N. S.) 877, 130 Am. St. Rep. 492; *Henry v. Selva*, 99 Ky. 232, 35 S. W. 645, 18 Ky. L. Rep. 473.

first pavement (as sometimes called),⁴⁹ reconstruction,⁵⁰ repavement,⁵¹ or repairs⁵² depends upon the character and extent of the work done, in view of the law applicable.⁵³

§ 2031. Same—effect of provisions for repairs on validity of assessment.⁵⁴

Original construction of a highway mainly through a bond issue, although certain taxpayers made some contribution to its cost, will not preclude subsequent improvement as for original construction at the expense of property owners benefited. *Ludlow v. Ludlow*, 252 Fed. 559.

⁴⁹ **First pavement**, under a law exempting property owners from liability for any subsequent pavement, is a change of any ordinary road into a street. *Philadelphia v. Edmonds*, 59 Pa. Super. Ct. 324; *Pottsville v. Jones*, 63 Pa. Super. Ct. 180.

Mere recognition by the municipality of the road as a street, etc. *Philadelphia v. Kerchner*, 62 Pa. Super. Ct. 562.

⁵⁰ **Reconstruction** distinguished from repair. *Fuche v. Cedar Rapids*, 158 Iowa 392, 139 N. W. 903; *Noel v. Lees Summit*, 166 Mo. App. 114, 120 S. W.

⁵¹ **Repaving** means paving again, taking up the old pavement and replacing it with new. Repavement does not include parts of a street never before paved, although the street had been paved in part prior. *People v. Buffalo*, 137 N. Y. S. 464, 77 Misc. Rep. 532.

⁵² **Repairing** means restoration

of the paved surface. *People v. Buffalo*, 137 N. Y. S. 464, 77 Misc. Rep. 532.

⁵³ *Lambert v. Thornberry*, 153 Ky. 523, 155 S. W. 1163; *Shuey v. Trapp*, 166 Ky. 696, 179 S. W. 578; *Weber v. Knepple*, 166 Ky. 228, 179 S. W. 19; *Parker-Washington Co. v. Meriwether*, 172 Mo. App. 344, 349, 158 S. W. 74.

Acceptance of a street fully constructed and in good condition throughout by the municipality, under law, imposed upon the city the obligation to improve and keep in repair thereafter. *Barber Asphalt Paving Co. v. Jurgens*, 170 Cal. 273, 149 Pac. 560; *Barber Asphalt Paving Co. v. Abrahamson* (Cal. App.), 175 Pac. 490.

⁵⁴ **Street paving—Guaranty** that the contractor will make good any defect in materials or workmanship appearing within five years, held valid against contention that it increased cost of the improvement, etc. Such provision “affords only a proper guaranty of the performance of the obligations of the contract and does not nullify the assessments.” *Lawrence v. Portland*, 85 Or. 586, 591, 167 Pac. 587, 593.

See § 1912, ante; § 1912, vol. 4, ante.

§ 2032. Same—changing course or width and vacating streets.⁵⁵

§ 2033. Same—railway tracks in streets.⁵⁶

§ 2034. Toll roads and turnpikes.⁵⁷

§ 2036. Street sprinkling and cleaning.⁵⁸

⁵⁵ *Chicago v. Chicago Rys. Co.*, 282 Ill. 383, 118 N. E. 728; *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543; *People v. Waldorf*, 153 N. Y. S. 1072, 168 App. Div. 473; *Stephens v. Crisfield*, 122 Md. 190, 89 Atl. 429; *Evans v. Crisfield*, 122 Md. 184, 89 Atl. 430; *Bass v. Bangor*, 111 Me. 390, 89 Atl. 309; *Seattle v. McElwein*, 75 Wash. 375, 134 Pac. 1089.

⁵⁶ *Maysville v. Davis*, 166 Ky. 555, 179 S. W. 463; *Philadelphia v. Philadelphia*, 244 Pa. 224, 90 Atl. 573.

⁵⁷ *Private toll road*, not being a public street, cannot be improved by the city by special assessment. *Philadelphia v. Kerchner*, 62 Pa. Super. Ct. 562.

⁵⁸ *Sprinkling streets*, held improvement to support special assessment, etc. *Roswell v. Bateman*, 20 N. Mex. 77, 146 Pac. 950.

In *Kentucky*, it was held that an act authorizing the assessment of the cost of street sprinkling against the abutting property was invalid on the ground that such property derived no special and distinct benefit therefrom. *Owensboro v. Sweeney*, 129 Ky. 607, 111 S. W. 364, 33 Ky. L. Rep. 823, 18 L. R. A. (N. S.) 181.

"An examination of this case," the same court in a later decision observed "will show that the court

based its opinion entirely on the fact that the sprinkling of streets was for the mere convenience, or pleasure, or comfort of the persons using the streets and did not materially benefit the abutting property by making the street more durable." *Henderson Traction Co. v. Henderson*, 178 Ky. 124, 128, 129, 198 S. W. 730.

Benefit to cemetery. "It is conceivable that cemetery property may receive a direct and peculiar benefit from the watering of adjacent streets. The freedom from clouds of offensive dust enjoyed by those who have occasion to visit it, the refreshment of its vegetation and the general cleanliness of its trees, monuments and cenotaphs allaying the heat of the atmosphere and rendering it fresher are all elements of direct and special benefits. These advantages, if found to flow from watering streets, well might render the cemetery more attractive and enable the plaintiff to sell its remaining lots more readily or at a higher price, or to charge more for annual care of lots already sold than would be possible without them. * * * But while it could not have been ruled as matter of law that the plaintiff could not be liable to a street watering assessment it cannot be said as matter of law to

§ 2036a. Oiling streets.

A law authorizing the levy of an assessment against a railway company for oiling the streets upon which the railway tracks are laid was held constitutional.⁵⁹

§ 2037. Sewers and drains.⁶⁰

be so liable. Whether its cemetery property is so subject or not depends upon the question whether in truth it does receive, to be a special benefit for the use to which it is devoted. It is plain that the ordinary dwelling or business establishment would be benefited by street watering. It is not equally plain that a cemetery would receive a legal benefit. Whether it would or not depends upon an ascertainment of the fact as a weighing of the factors which had been enumerated and all others which may be material. The physical features of the land, the extent and nature of its adornment, its trees and flowers, the number and tastes of its visitors, together with all other pertinent circumstances, all are proper for consideration in determining whether the valuable use of the cemetery may be enhanced by the watering of the streets upon which it abuts. Whether the plaintiff's cemetery was benefited in this sense is a fact to be determined upon evidence, and a finding upon this point should be made by the trial court. * * * The conclusion that a cemetery may be liable to a special assessment of this general nature is supported by the great weight of authority. * * * There are contrary authorities, resting generally, however, upon the

interpretation of exemption statutes and not upon abstract principles." *Garden Cemetery Corporation v. Baker*, 218 Mass. 339, 105 N. E. 1070, 1071, 1072, per Rugg, C. J.

⁵⁹ In the case determined it was admitted that "the spreading of the oil has the effect of not only improving the streets for the purpose of travel, but of preserving and making them more lasting. Under these circumstances we cannot say that the street railway company received no substantial benefit in return for the assessment. Indeed, we have heretofore held that part of the cost of improving a street might be assessed against a street railway company whose tracks ran over such streets. *Newport v. Silver*, 143 Ky. 704, 137 S. W. 546. And as it is admitted that the oiling of the streets is a permanent improvement, we see no reason why a reasonable part of the cost thereof may not be assessed against a street railway company which enjoys the use of such streets." *Henderson Traction Co. v. Henderson*, 178 Ky. 124, 128, 129, 198 S. W. 730.

⁶⁰ *Arizona. Globe v. Willis*, 16 Ariz. 378, 146 Pac. 544.

Connecticut. Re Dellaripa, 88 Conn. 565, 92 Atl. 116.

Indiana. Prevo v. Hammond, 186 Ind. 612, 116 N. E. 584.

§ 2039. Lighting plant.⁶¹§ 2040. Waterworks—water pipes.⁶²§ 2042. Miscellaneous objects.⁶³

Illinois. *Bradley v. New York Central R. Co.*, 277 Ill. 608, 115 N. E. 640, 643, 644.

Kentucky. *Bayes v. Paintsville*, 166 Ky. 679, 179 S. W. 623 L. R. A. 1916B, 1027; *Gesser v. Mc-Lane*, 156 Ky. 743, 161 S. W. 1118.

Missouri. *Whitsett v. Carthage*, 270 Mo. 269, 280 et seq., 193 S. W. 21; *Bambrick Bros. Constr. Co. v. Semple Place Realty Co.*, 270 Mo. 450, 193 S. W. 543.

Maryland. *Lyon v. Hyattsville*, 125 Md. 306, 93 Atl. 919.

New York. *Harris v. Churchill*, 152 N. Y. S. 73.

North Dakota. *Ellison v. Lamoure*, 30 N. D. 43, 151 N. W. 988.

Oregon. *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308; *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809.

If a small local sewer will be sufficient, a property owner should not be assessed for a main sewer. *West Liberty Avenue Sewer*, 54 Pa. Super. Ct. 242.

Notice to taxpayers need not be given in adopting plans for sewers and designating the area to be drained, since this is an exercise of the police power. *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308, 312.

A sewer outlet beyond the municipal area may be secured by an assessment. *Kraft v. Smothers*, 103 Ark. 269, 146 S. W. 505, § 1434, vol. 4, § 2054.

⁶¹ *Woodring v. Straup*, 45 Utah 173, 143 Pac. 592; *Ankeny v. Spokane*, 92 Wash. 549, 159 Pac. 806, L. R. A. 1917A, 1093; *Wilt v. Bueter*, 186 Ind. 98, 111 N. E. 926; *Grand Ridge v. Hayes*, 271 Ill. 431, 111 N. E. 289.

⁶² *Pomroy v. Board of Public Water Works*, 55 Colo. 476, 136 Pac. 78; *Woodring v. Straup*, 45 Utah 173, 143 Pac. 592.

Mains and fire hydrants along the principal streets, as a part of waterworks, held not a local improvement. *Grand Ridge v. Hayes*, 271 Ill. 431, 111 N. E. 289.

Whether a distributing system constitutes a general benefit or is of special benefit are questions which can be urged only to the council on a hearing upon the assessment roll for the local improvement, as indicated in the law applicable. *Matthews v. Ellensburg*, 73 Wash. 272, 133 Pac. 839, 842.

Authorized for water supply. *Felmet v. Canton* (N. C. 1919), 97 S. E. 728.

⁶³ Harbor improvements and improvements to protect land, held under particular laws two kinds of public work. Special assessments may be made for the latter but not for the former. *Boettger v. Two Rivers*, 157 Wis. 60, 127 N. W. 66, 144 N. W. 1097.

Construction of sea walls, breakwaters and bulkheads to protect streets and public ways along the

III. PROPERTY SUBJECT TO ASSESSMENT.

§ 2043. Necessity of benefit to property by improvement.⁶⁴

Property subject to special assessment or tax will depend, of course, upon the controlling law.⁶⁵ In levying the assessment or special tax it is essential to observe the mandatory provisions of the governing law. Thus where the statute limits the property which may be subjected to the assessment to that which is abutting or contiguous or adjoining, or fronting, only property

shore of a body of water or along the beach. *Bouslog v. Gulfport*, 112 Miss. 184, 72 So. 896; *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

⁶⁴ *Colorado. Pomroy v. Board of Public Works*, 55 Colo. 476, 136 Pac. 78.

Illinois. Chicago v. Farwell, 284 Ill. 491, 120 N. E. 520; *Kankakee v. Illinois Central R. Co.*, 263 Ill. 589, 105 N. E. 731, 264 Ill. 69, 105 N. E. 734; *Kankakee v. Illinois Central R. Co.*, 258 Ill. 368, 101 N. E. 592; *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946.

Iowa. Chicago Great Western Ry. Co. v. Council Bluffs, 176 Iowa 247, 157 N. W. 947, 951.

Michigan. German Lutheran Church Society v. Mt. Clemens, 179 Mich. 35, 146 N. W. 287.

Missouri. State ex rel. v. Chi'llicothé, 237 Mo. 486, 141 S. W. 602; *McQueen v. Van Deusen*, 189 Mo. App. 492, 176 S. W. 1057.

Maine. Auburn v. Paul, 110 Me. 192, 85 Atl. 571.

Maryland. United States Rys. & Elec. Co. v. Baltimore, 127 Md. 660, 96 Atl. 880.

*N. Dakota. McKenzie v. Man-
dan*, 27 N. D. 546, 147 N. W. 808.

Nebraska. McCaffrey v. Omaha, 91 Neb. 184, 135 N. W. 552, 136 N. W. 343.

Oklahoma. Tulsa v. McCormick (Okl.), 164 Pac. 985.

Ohio. Cincinnati v. Doerger, 98 Ohio 161, 120 N. E. 304.

Utah. Lannan v. Waltenspiel, 45 Utah 564, 147 Pac. 908.

Washington. Viegler v. Spokane, 78 Wash. 359, 139 Pac. 33; *Re Eighth Ave., Seattle*, 77 Wash. 570, 138 Pac. 10; *Re Orcas Street*, 87 Wash. 218, 151 Pac. 506; *Vancouver v. Corporation of Catholic Bishop*, 90 Wash. 319, 156 Pac. 383; *Horton Inv. Co. v. Seattle*, 95 Wash. 556, 162 Pac. 989.

United States. Lancaster v. Police Jury, 254 Fed. 187.

⁶⁵ In the absence of express statute to the contrary only such property as fronts along the side lines of a street or alley is chargeable with the cost of a public improvement therein, and land whose side line lies along the rear end of a blind alley is not so chargeable. *Kingshighway Supply Co. v. Banner Iron Works*, 266 Mo. 138, 150, 181 S. W. 30.

so situated with reference to the improvement can be made liable. Municipal ordinances in conflict with state statutes applicable must yield.⁶⁶ "A thing which is not a benefit cannot be made the basis of an assessment for benefits. This would seem to be axiomatic."⁶⁷

Therefore, the general rule is that property not benefited cannot be assessed.⁶⁸

And also the general rule is that property cannot be assessed for more than it is benefited.⁶⁹

⁶⁶State ex rel. v. Chillicothe, 237 Mo. 486, 141 S. W. 602.

Property not bordering on the improvement is not liable on the theory of general advance in value of property in the vicinity. Philadelphia v. Conway, 257 Pa. 172, 101 Atl. 472.

⁶⁷Horton Inv. Co. v. Seattle, 95 Wash. 556, 162 Pac. 989, 991.

⁶⁸Bolcom Mills v. Seattle, 94 Wash. 583, 162 Pac. 1010; Re Elliott Avenue, 74 Wash. 184, 133 Pac. 8; Spokane v. Fonnell, 75 Wash. 417, 135 Pac. 211; Aumiller v. North Yakima, 73 Wash. 96, 131 Pac. 470; Ankeny v. Spokane, 92 Wash. 549, 159 Pac. 806.

Assessments cannot be made arbitrarily against property owners for improvements but such assessments must be reasonable, having reference to the benefit conferred. Sick v. Bay St. Louis, 113 Miss. 175, 74 So. 272.

"A special assessment is only justified by special benefits to the property assessed, and the law is that property cannot be specially assessed where it will not be benefited by the improvement unless some other work for which no provision has been made shall be done in the future." River Forest v.

Cummings, 261 Ill. 228, 103 N. E. 971.

Property must be assessed solely in view of benefits, irrespective of former local assessment or assessments to be made in the future. Kankakee v. Illinois Central R. Co., 257 Ill. 288, 100 N. E. 996.

Benefit is a question of fact. Trimble v. Seattle, 93 Wash. 472, 161 Pac. 381.

"The city, like a private owner, can only be assessed for an improvement where it is specially benefited." Spokane v. Miles, 72 Wash. 571, 131 Pac. 206, quoting from Spokane v. Curtiss, 66 Wash. 555, 120 Pac. 70.

⁶⁹Snetzer v. Gregg, 129 Ark. 542, 196 S. W. 925, L. R. A. 1917F, 999; Bolcom Mills v. Seattle, 94 Wash. 583, 162 Pac. 1010; Reynolds v. Cosmopolis, 84 Wash. 660, 147 Pac. 407; State ex rel. v. Wright, 76 Wash. 383, 136 Pac. 482; Horton Inv. Co. v. Seattle, 95 Wash. 583, 162 Pac. 989; Hester v. Thompson, 217 Mass. 422, 105 N. E. 631; Staunton v. Bond, 281 Ill. 568, 118 N. E. 47; Chicago v. Kehilath Anshe Mayriv, 284 Ill. 210, 119 N. E. 905; Chicago v. Marsh, 251 Ill. 298, 96 N. E. 250; Dallas v. Atkins (Tex. Civ. App.), 197 S. W. 593.

Where the benefit is peculiarly a matter of opinion, usually courts will not interfere.⁷⁰

Ordinarily determination by the appropriate municipal authorities that property will be benefited, being legislative, will not be reviewed by the courts unless there is a showing of fraud or grossly arbitrary action.⁷¹

Assessment not exceeding one-half value of property, held valid. *Re Starr Street*, 131 N. Y. S. 71, 73 Misc. Rep. 380.

Apportionment between the city and property owners, should be according to respective benefits. *Spokane v. Curtiss*, 66 Wash. 556, 120 Pac. 70.

"As a rule assessments based on the street frontage or on the area or on a combination of the two in accordance with legislative authority, and not in substantial excess of benefits conferred, have been upheld as not infringing the state or federal constitution." *Driscoll v. North Bridge*, 210 Mass. 151, 96 N. E. 59.

"It is possible that the plan of assessment may be just and commonly produce equitable results, and yet work so harshly as to a particular estate by reason of its remote location or otherwise, as to produce an assessment largely in excess of the benefit." *Driscoll v. North Bridge*, 210 Mass. 151, 96 N. E. 59, per Rugg, C. J.

Uniformity and unjust discrimination. *Mullins v. Little Rock*, 131 Ark. 59, 198 S. W. 262.

See § 2021, ante.

⁷⁰ *Re Boyer Ave.*, Seattle, 79 Wash. 664, 141 Pac. 58.

Right of an abutting proprietor to contest a local assessment for paving on the ground of inequality or lack of benefit to the property,

denied, as the question was said to be settled by state and United States decisions. *Shreveport v. Shreveport*, 134 La. 568, 64 So. 414.

"The question of benefits is one of fact, and if determined by the proper tribunal that the property is specially benefited by the construction of a sewer, an assessment is proper to the extent of such benefit, whether the property is abutting or contiguous to the improvement or not." *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308, 314, quoting from and approving *Beckett v. Portland*, 53 Or. 169, 173, 99 Pac. 659, 660.

Often the amount of public benefits may be fixed by ordinance. *Mushbaugh v. East Peoria*, 260 Ill. 27, 102 N. E. 1027.

⁷¹ *Great Northern R. Co. v. Seattle*, 73 Wash. 576, 132 Pac. 234.

"Speaking generally, there is a fair presumption that all real estate receives some degree of benefit from the permanent improvement of a street upon which it abuts. It is upon such presumption that the whole system of special assessments for local improvements is justified and sustained. Acting upon such presumption, city council have been clothed with a certain degree of legislative power to determine when it is expedient and proper to pave any given street

The benefit must result from the improvement for which the assessment was made and not from other improvements.⁷²

The assessments may be levied against several lots as a whole, and this is true although the applicable law provides that a special assessment shall not exceed the benefit to the property assessed.⁷³

or streets and to provide within certain limitations how the cost thereof shall be defrayed. This discretion includes the authority to assess such costs upon the abutting in proportion to the benefits accruing to such property. * * * The action of the council in ordering the pavement and providing that the cost shall be assessed upon the abutting property is a legislative determination that the improvement is expedient and proper, and that the property abutting upon the improvement will be benefited thereby, and such determination cannot be set aside or overruled in a judicial proceeding. *Chicago, R. I. & P. Ry. Co. v. Centerville*, 172 Iowa 444, 153 N. W. 106, modified 154 N. W. 596, approved in *Re Jefferson Street Sewer*, 179 Iowa 975, 162 N. W. 239.

⁷² *Re West, Wheeler St., Seattle*, 77 Wash. 3, 137 Pac. 303.

Benefit arising from whole improvement. "The benefit derived from any part of the improvement must be assessed against the property receiving it, and must be considered as arising from the whole improvement, but the assessment cannot exceed the amount of the benefit or the proportional amount of the whole assessment which the particular property should bear. If because the bene-

fit is derived from some particular element of the improvement, the benefit is less or greater, that fact must be considered in determining the proportional amount the property should bear, but the portion must be arrived at by comparison with the cost of the whole improvement, and not by comparison with the cost of special parts of the improvement regarded as if they were separate improvements." *Chicago v. Farwell*, 284 Ill. 491, 120 N. E. 520.

⁷³ "If the benefits had been assessed separately against each lot there would be much force in the contention that the taxes could not be levied against the entire piece of land as a unit because of the provision that a special assessment must not exceed either the benefit to the piece assessed or the cost of so much of the improvement as it abuts. * * * The converse, however, as in this case, is not true. If, as we have just held, the benefits were properly assessed to the piece of land as a unit because it belonged to and was used as such by one owner, the benefits, not to each lot, but to the piece as a whole, fix the maximum assessment. But the cost of the work in front of each lot could be, and in this case was, determined. No possible harm can result to the owner by dividing the total tax

§ 2044. Same—general and special benefits.⁷⁴

Constitutions and statutes forbid assessments in excess of the increased value of the property by reason of the special benefits derived from the improvement.⁷⁵

But apart from such express inhibition it is the settled law that special assessments can be sustained only upon the theory that the property assessed receives some special benefit from the improvement differing from the benefit that the general public enjoys. "This is the foundation of the right to levy special assessments and without such foundation the right must fail."⁷⁶

which was less than the benefits between the several lots, apportioning, however, to each of them an amount in no case greater than the cost of the abutting section of the improvement. In the absence of a specific statutory provision requiring the tax to be levied against the property exactly as described in the benefit assessment the method here pursued cannot be declared illegal or arbitrary. *Abbot v. Milwaukee*, 236 Fed. 671, 150 C. C. A. 3.

⁷⁴ *Illinois. East St. Louis v. Vogel*, 276 Ill. 490, 114 N. E. 941; *Oak Park v. Swigart*, 262 Ill. 614, 104 N. E. 1033.

Maryland. Consolidated Gas, El. & P. Co. v. Baltimore, 130 Md. 20, 99 Atl. 968.

Missouri. Mullins v. Mt. St. Mary's Cemetery Assn., 268 Mo. 691, 187 S. W. 1169.

N. Carolina. Justice v. Asheville, 161 N. C. 62, 76 S. E. 822.

S. Dakota. Haggart v. Alton, 29 S. D. 509, 137 N. W. 372.

Washington. Seattle v. Jones, 95 Wash. 5, 163 Pac. 12; *Re Shilshole Ave.*, 85 Wash. 522, 148 Pac. 781; *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211.

Must be special benefit to sustain assessment. *Seattle Seminary v. Seattle*, 81 Wash. 125, 142 Pac. 483.

⁷⁵ *Duke v. Anniston*, 5 Ala. App. 248, 60 So. 447.

"No city, town or other municipality shall make any assessment for the cost of sidewalks or street paving, or for the cost of the construction of any sewer against property abutting on such street or sidewalk so paved, or drained by such sewer, in excess of the increased value of such property by reason of the special benefits derived from such improvement."

Under this constitutional provision, "It is evident that the assessment cannot be predicated upon a general enhancement of the value of the property, the difference in the market value before and after the improvement, regardless of a special benefit to the owner resulting from said improvement and which increased the value of the property." *Tuscaloosa v. Hill*, 194 Ala. 559, 69 So. 598, overruling 14 Ala. App. 541, 69 So. 486, and citing § 2018, vol. 5, ante (*McQuillin, Mun. Ord. § 522*).

⁷⁶ *Lansing v. Jenison*, 201 Mich.

Special benefits are those which the property assessed receives due to the improvement in excess of the general public benefit.⁷⁷

It has been said that special benefits which will sustain a special assessment must be immediate and of such a character that they can be seen and traced. Remote or contingent benefits enjoyed by the general public will not sustain such assessment.⁷⁸

§ 2045. Same—character and extent.⁷⁹

Access is a special benefit.⁸⁰

491, 167 N. W. 947; *Duniway v. Cellars-Murton Co.* (Ore. 1919), 179 Pac. 561; *Re Seattle*, 66 Wash. 327, 119 Pac. 852.

⁷⁷ *Corliss v. Richford*, 85 Vt. 85, 81 Atl. 234.

Under a law requiring apportionment of special benefits between the property owners and the city due to the improvement, the benefit to the public must be a special benefit as distinguished from the benefit resulting in a general way from every improvement. *Re Seattle*, 66 Wash. 327, 119 Pac. 852.

Laws require part to be assessed against city and part against property owners. *Re Starr Street*, 131 N. Y. S. 71, 73 Misc. Rep. 380.

“A special or local assessment is a burden imposed upon real property for a local public improvement; the extent of the burden being determined by the special benefits which inure to the assessed property as the result of the improvement. Assessments of this character are upheld upon the theory that the special benefits inuring to the property assessed or equal to the burden therefor imposed; that is to say, that an im-

provement to defray the expense of which the proceeds of the special assessments are applied must benefit the property on which the special assessment is levied in a manner local in its nature, and which does not attach to other property of a like character, and in order to be valid must specially enhance the value of the property against which such assessment is levied at least equal to the amount so assessed.” *Pomroy v. Board of Public Water Works*, 55 Colo. 476, 136 Pac. 78.

⁷⁸ *Pomroy v. Board of Public Water Works*, 55 Colo. 476, 136 Pac. 78.

Conclusiveness of determination by board that property has been benefited by the improvement. *Huntsville v. Goodenrath*, 13 Ala. 579, 68 So. 676.

⁷⁹ *Chicago v. Farwell*, 284 Ill. 491, 120 N. E. 520; *Highwood v. Chicago & Milwaukee Elec. R. Co.*, 268 Ill. 482, 109 N. E. 270.

Sewer assessment unauthorized of lands that are not and cannot be drained by the improvement. *Duniway v. Cellars-Murton Co.* (Or. 1919), 179 Pac. 561.

⁸⁰ The matter of access to a park

The use to which the property is put cannot of itself determine the question of benefits, but the usual test is the increase of value for any use to which the land might be adapted.⁸¹

"The rules by which the amount of benefit conferred upon land by a public improvement is to be ascertained, when that question arises for settlement as a matter of fact, are the same as those by which land values are determined in any other connection. The inquiry is, how much has the particular public improvement added to the fair market value of the property as between a willing seller and a willing buyer with reference to all the uses to which it is reasonably adapted and for which it is plainly available, prospective as well as present, by strangers as well as by the owner? Chances and probabilities of future use, as sufficiently near in time and definite in kind to be of practicable importance, enter into present market value, and so far as they enhance or diminish it, are to be given full weight. But where they are so remote as to rest chiefly in the imagination, and do not in fact influence the price which customers

is a special benefit. "Such a benefit, like any other circumstance peculiarly enhancing the use, convenience or enjoyment of property, or in any manner making its environment more desirable is a benefit sufficient to sustain a special assessment." *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211.

By the access to a public park due to an improvement, held not a special benefit to the city as a corporate entity and to the inhabitants thereof generally as to constitute it a special benefit, to sustain a part of the assessment against the city. *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211; *Spokane v. Curtiss*, 65 Wash. 555, 120 Pac. 70.

⁸¹ *Vancouver v. Corporation of Catholic Bishop*, 90 Wash. 319, 156 Pac. 383.

The present use of property cannot be made the basis of determining the benefits which may accrue to the property, but the present as well as the future use to which the property might be devoted should be considered. *Re West Wheeler Street*, 97 Wash. 669, 167 Pac. 41.

Measure of benefit to land owned by a railroad company but not devoted to railroad purposes. *Lincoln v. Chicago & Alton R. Co.*, 262 Ill. 11, 16, 104 N. E. 277; 263 Ill. 114, 104 N. E. 1022.

would be willing to pay in a present sale, they cannot be the basis of a determination of benefit or value.”⁸²

§ 2046. Same—effect of like existing improvements.⁸³

§ 2049. Unplatted and rural lands.⁸⁴

§ 2050. Railroad property.⁸⁵

Whether railroad property is subject to assessment for local improvements is dependent on the applicable law and its reasonable construction.⁸⁶

⁸² Per Rugg, C. J., in *Driscoll v. North Bridge*, 210 Mass. 151, 96 N. E. 59.

⁸³ Where property is well supplied with drainage by an adequate sewer such property cannot be assessed for the construction of an additional sewer which renders no additional benefit to the property. *Cincinnati v. Doerger*, 98 Ohio 161, 120 N. E. 304.

“If land is drained sufficiently by existing sewers authorized by the municipality, no assessments can be made for the construction of a new sewer, when no benefit to the realty is derived therefrom.” *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308, 316.

One claiming his lot is not subject to assessment for sewer construction because such lot is already provided with local drainage, must prove such claim. *Cincinnati v. Polster*, 96 Ohio 155, 117 N. E. 155.

New sewer was constructed where an old sewer existed which was not assessable, and the new sewer constituted a benefit, and therefore special assessment was valid. *Appeal of North Yakima*, 87 Wash. 279, 151 Pac. 795.

⁸⁴ *Watts v. Winfield*, 101 Kan. 470, 168 Pac. 319; *Rockliffe-Gibson Const. Co. v. Zeilda Forsee Inv. Co.*, 179 Mo. App. 229, 166 S. W. 849; *Rolla v. Schuman*, 189 Mo. App. 252, 175 S. W. 241; *Whitsett v. Carthage*, 270 Mo. 269, 193 S. W. 21; *Lath v. St. Louis*, 257 Mo. 399, 165 S. W. 1023; *Walter C. Sivyver & Sons Co. v. Spokane*, 78 Wash. 282, 137 Pac. 808.

Agricultural land, held subject to assessment for sewer construction. *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308, 315.

Farming land, held benefited by sewer. *Graham v. Grand Rapids*, 179 Mich. 378, 146 N. W. 248.

⁸⁵ *Chicago v. Chicago Rys. Co.* (Ill. 1919), 125 N. E. 327; *Highwood v. Chicago & N. W. Ry. Co.*, 276 Ill. 98, 114 N. E. 585; *Mushbaugh v. East Peoria*, 260 Ill. 27, 102 N. E. 1027; *Atchison T. & S. F. Ry. Co. v. Chanute*, 95 Kan. 161, 147 Pac. 836; *People v. Waldorf*, 153 N. Y. S. 1072, 168 App. Div. 473.

⁸⁶ Parts occupied by tracks to be paved and kept in repair by company, by franchise. *Lincoln v. Chicago & A. R. Co.*, 262 Ill. 11, 104 N. E. 277.

When such property is specially benefited by the improvement,⁸⁷ it is often held that it may be assessed its

Easement of railroad company in a street, held not assessable for a proportion of the costs for the construction of a bridge crossing a canal in the street. *Re Seattle*, 66 Wash. 277, 119 Pac. 798.

⁸⁷ To sustain an assessment for paving there must be special benefit. *United States Rys. & Elec. Co. v. Baltimore*, 127 Md. 660, 96 Atl. 880.

The easement of a railway may be assessed if benefited. *Hoffman v. Zollman*, 49 Ind. App. 664, 97 N. E. 1015.

An interurban right-of-way falls within the meaning of the phrase "land or property," as to assessments for local improvements. *Marion B. & E. Traction Co. v. Simmons*, 180 Ind. 289, 102 N. E. 132.

Company held subject to assessment for sidewalk on an intersecting street abutting its property. *New York Central & H. R. R. Co. v. Buffalo*, 135 N. Y. 196, 76 Misc. Rep. 655.

Cannot assess railroad right-of-way for improvement of street underneath. *New York, N. H. & H. R. Co. v. Port Chester*, 134 N. Y. S. 883, 149 App. Div. 893.

"While there may be conditions under which a railroad right-of-way is benefited and can be assessed for a local improvement, as a general rule such a local improvement as a pavement is of no benefit to the right-of-way." *Chicago v. Chicago & N. W. Ry. Co.*, 278 Ill. 86, 115 N. E. 836.

Assessment for a sewer against the tracks and right-of-way of a street and interurban railway lo-

cated longitudinally on a street within the benefit district denied under particular statute. *Indiana Union Traction Co. v. Gough*, 54 Ind. App. 438, 102 N. E. 453.

Where a team track of a railway company adjoins a paved street which connects with cross-streets also paved, the fact that there are several vacant lots on other streets, and that it will facilitate the delivery of building material unloaded on the team track for use in building houses on such lots, if the streets on which they are located are paved, does not constitute a special benefit to the company but is one that will be enjoyed by the public at large." *Oak Park v. Swigart*, 262 Ill. 614, 104 N. E. 1033.

If a railroad right of way is benefited at all, the evidence must show that it is benefited for the special use to which the property is devoted. "Where land is restricted to a special use, such as railroad right-of-way, the measure of benefits which it may receive from a local improvement is the increased value of the property for such special use. * * * The test is whether the right-of-way of the railroad property will be benefited in its market value for the use to which it is being put and not its probable future use. It cannot be taxed upon the benefits thus received. * * * Increased profits or increase of revenue of the railroad company on account of the accessibility to its station cannot be taken into consideration in assessing benefits to its right-of-way

proportionate benefit therefor,⁸⁸ but, as stated, whether or not assessable is to be determined by the proper construction of the controlling law.

"The rule with respect to assessments for local improvements is that the right of way of a railroad company, being in legal contemplation land used for railroad purposes, cannot be assessed upon the basis either of the general or special enhancement of its market value but only for actual benefit to such land for the public use for which it was acquired."⁸⁹

Under some statutes and municipal charters the right of way of a railroad company is subject to taxation for local improvements, the same as other lands benefited

property. The benefits from such a cause are based upon mere conjecture, and such an element cannot be considered in estimating benefits for a local improvement." *Chicago v. Chicago & N. W. Ry. Co.*, 278 Ill. 86, 115 N. E. 836.

⁸⁸ *Georgia R. & B. Co. v. Decatur*, 137 Ga. 537, 75 S. E. 830; *Georgia Ry. & El. Co. v. Atlanta*, 144 Ga. 722, 87 S. E. 1058; *Lincoln v. Chicago & Alton R. Co.*, 262 Ill. 11, 104 N. E. 277; *Kankakee v. Illinois Central R. Co.*, 258 Ill. 368, 101 N. E. 592, 263 Ill. 589, 105 N. E. 731, 264 Ill. 69, 105 N. E. 734; *Municipal Securities Corp. v. Metropolitan Street Ry. Co.*, 196 Mo. App. 518, 196 S. W. 400; *Great Northern R. Co. v. Seattle*, 73 Wash. 576, 132 Pac. 234.

Subject to, by statute. *Chicago, M. & St. P. Ry. Co. v. Poland*, 54 Mont. 497, 172 Pac. 541.

Right of way may be assessed, by statute. *Chicago Great Western Ry. Co. v. Council Bluffs*, 176 Iowa 247, 157 N. W. 947, 950.

Right of way subject to, for street improvement by statute. *Chicago, M. & St. P. Ry. Co. v. Milwaukee*, 148 Wis. 39, 133 N.

W. 1120; *Des Moines City Ry. Co. v. Des Moines (Ia.)*, 159 N. W. 450.

Right of way abutting on a street is subject to assessment for the improvement of such street. *Haynes Automobile Co. v. Kokomo*, 186 Ind. 9, 114 N. E. 758, approving *Pittsburgh, etc., R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741, 11 Ann. Cas. 808.

⁸⁹ *New York Bay R. Co. v. Newark*, 82 N. J. L. 591, 83 Atl. 962, reversing 80 N. J. L. 146, 76 Atl. 327.

Such assessment may rest upon the increased facility of use for railroad purposes, and not upon the enhanced market value. *Erie R. Co. v. Passaic*, 91 N. J. L. 504, 103 Atl. 855.

Measure is increased value of property for use for railroad purposes when it is so devoted. *Kankakee v. Illinois Central R. Co.*, 257 Ill. 238, 100 N. E. 996.

May be taxed for local improvements in the amount of the enhanced value of the property. *Kankakee v. Illinois Central R. Co.*, 263 Ill. 589, 105 N. E. 731.

by the improvement, as lands in the benefit district, or abutting upon the street improvements.⁹⁰

In Pennsylvania the roadbed and right of way of a railroad are exempt from assessment for municipal improvements. But this exemption does not extend to stations, platforms and other property of the railroad, not absolutely necessary to the exercise of the franchise of the corporation.⁹¹

On the general subject of special assessments against railroad property for local improvements, in Wisconsin, three propositions are now considered as settled: First, that the statute that makes railroad property subject to assessment for local improvements to the same extent as private property is a valid exercise of legislative power. Second, that in considering the question of the benefits resulting from such improvements, railroad property is to be considered, not with reference to its present use, but with reference to its adaptability for other and general uses in the future. Third, that when it is provided by law that assessments of benefits for local improvements may be levied against abutting or adjacent real estate, the word adjacent signifies lying near to, but not actually touching the improvement, but separated therefrom by an intervening parcel or strip.⁹²

A municipality, it has been held, may accept paving

⁹⁰ *Gilsonite Construction Company v. St. Louis, Iron Mountain & Southern Ry. Co.*, 240 Mo. 650, 654, 144 S. W. 1086.

Heman Construction Co. v. Wabash R. Co., 206 Mo. 172, 104 S. W. 67, announced the same rule after an exhaustive review of the authorities, and this case also holds that the right of way of a railroad company was not a public highway within the meaning of the constitution of the state exempting public highways from taxation.

It appears that the question is no longer debatable in Missouri, and it is equally well settled in that state that such assessments do not violate either the state or federal constitution. *Gilsonite Construction Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 240 Mo. 650, 655, 144 S. W. 1086.

⁹¹ *South Fork Borough v. Pennsylvania R. Co.*, 251 Pa. 261, 96 Atl. 710.

⁹² *Per Winslow, C. J.*, in *Superior v. Lake Superior T. & T. Ry. Co.*, 152 Wis. 389, 140 N. W. 26.

of a portion of the street by a railroad company as the equivalent of an assessment.⁹³

Such contract, it is held, applies only to surface improvements, and hence an assessment may be made against the railroad for widening a street.⁹⁴

§ 2051. Same—various uses illustrated.⁹⁵

§ 2052. Assessment districts.⁹⁶

In matters of taxation the power of the legislature is unlimited except as restricted by the constitution. What shall constitute a taxing district, and whether it may be confined to, or disregard, boundary lines of counties, townships or lesser municipalities, is a matter wholly within the discretion of the legislature.⁹⁷

Thus it is within the power of the legislature to create assessment, improvement, benefit or special taxing districts, and to charge the cost of a local improvement, in

⁹³ *Lincoln v. Chicago & Alton R. Co.*, 262 Ill. 11, 16, 104 N. E. 277.

Levy of special assessment denied, where the company was required by law to pave and keep in repair that part of the street between its tracks and two feet beyond each rail, because of absence of special benefits. *United States Rys. & Electric Co. v. Baltimore*, 127 Md. 660, 96 Atl. 880.

⁹⁴ *Chicago v. Chicago Rys. Co.*, 282 Ill. 383, 118 N. E. 728.

⁹⁵ *Car barn and storage yards*, subject to. *Re Public Playgrounds*, 157 N. Y. S. 991, 993, 93 Misc. Rep. 289.

Property on which are located car barns and shops, and switches, may be assessed for the improvement of streets upon which it abuts. *Municipal Securities Corp. v. Metropolitan Street Ry Co.*, 196 Mo. App. 518, 196 S. W. 400.

Station property whether subject to assessment. *Re Blondell Ave.*, New York City, 150 N. Y. S. 403; *People v. Waldorf*, 153 N. Y. S. 1072, 168 App. Div. 473.

Station property of railroad, held could not be assessed for opening and extending a street. *Re Blondell Avenue*, New York, 167 N. Y. S. 789, 180 App. Div. 430.

⁹⁶ *Van Zanten v. Grand Haven*, 174 Mich. 282, 140 N. W. 471.

⁹⁷ *Brown v. Baltimore & O. & C. R. Co.*, 186 Ind. 81, 115 N. E. 86.

“The legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the 14th amendment unless its action is palpably arbitrary or a plain abuse. *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 240 U. S. 55, 58, 36 Sup. Ct. 2540, 60 L. ed. 523.

whole or in part, upon the property in such district, either according to valuation or superficial area or frontage,⁹⁸ or the power to create such districts may be delegated to state agencies, as municipalities.⁹⁹

⁹⁸ *McGhee v. Walsh*, 249 Mo. 266, 284, 155 S. W. 445.

Legislature may create. *Rawlins v. Warner-Quinlan Asphalt Co.* (Okla.), 174 Pac. 526; *Re Sewer in Kissel Ave. and Brighton Boul.*, 143 N. Y. S. 467, 81 Misc. Rep. 541.

Flood control district. Establishing districts are primarily legislative questions. *Los Angeles County Flood Control District v. Hamilton*, 177 Cal. 119, 169 Pac. 1028.

⁹⁹ Legislature may delegate power to create taxing districts to promote local improvements to municipal corporations. *Lancaster v. Police Jury*, 254 Fed. 187.

Law authorizing the establishment of improvement districts in municipalities, sustained as constitutional. *Palmer v. Farmington* (N. Mex. 1919), 179 Pac. 227, 230, following Arkansas decisions from which state the statute was taken.

May be done in the legislative act or by the city under the power to make the improvement and to levy the assessments. *Justice v. Asheville*, 161 N. C. 62, 76 S. E. 822, 827.

Power to construct a sewer system and to assess the property directly benefited is authority to define the area to be drained. *Rogers v. Salem*, 61 Ore. 321, 122 Pac. 308.

Assessment district may be established by ordinance which

should include all lands specially benefited by the proposed improvement and the limits of which are to be fixed definitely. *Re Eighth Ave., Seattle*, 77 Wash. 570, 138 Pac. 10; *Re Orcas Street*, 87 Wash. 218, 151 Pac. 506.

Benefit district as prescribed by charter. *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 259 Mo. 153, 168 S. W. 687.

Improvement district. *State v. Trulock*, 109 Ark. 556, 160 S. W. 516; *Lewis v. Reiff*, 114 Ark. 366, 169 S. W. 1184.

Improvement district may include the whole municipality. *Meehan v. Maxwell*, 115 Ark. 594, 172 S. W. 1013.

Improvement district embracing the whole city for the purpose of erecting and maintaining a bridge across a lake. Matter within discretion of municipal authorities. *Ferguson v. McLain*, 113 Ark. 193, 168 S. W. 127.

Improvement district to construct a bridge across a river upon which the town was located. *Mullins v. Little Rock*, 131 Ark. 59, 198 S. W. 262; *Mullins v. Little Rock*, 113 Ark. 590, 168 S. W. 1074, following *Ferguson v. McLain*, 113 Ark. 193, 168 S. W. 127.

Improvement district to construct a bridge, or such part thereof as should be within the limits of the district, held illegal. *Mullins v. Commissioners*, 114 Ark. 324, 170 S. W. 65.

In Arkansas, the fact that the

Statutes or charters often definitely prescribe the precise method to be followed in establishing such districts, that is, the manner in which the boundary lines are to

territory described includes two other districts organized for the purpose of paving portions of certain streets does not render the district invalid. *Freeze v. Improvement District*, 126 Ark. 172, 189 S. W. 660, 662, following *Boles v. Kelley*, 90 Ark. 29, 117 S. W. 1073.

Law provides for annexation to improvement districts in order to extend the improvement. When annexed, the separate identity of the parts of the enlarged district must be preserved to the extent, at least, that the annexed part may bear the burden of the additional expense. *White v. Laughborough*, 125 Ark. 57, 188 S. W. 10, 14.

Benefit district. Spaces may be sodded and left unpaved although forming a part of the streets. They are only ornamental, it is true, but they nevertheless form a part of the street. *Crowley v. Police Jury*, 138 La. 488, 70 So. 487.

Street improvement district.

Arkansas. *Smith v. Improvement Dist.*, 108 Ark. 141, 156 S. W. 455; *Voss v. Reyburn*, 104 Ark. 298, 148 S. W. 510; *Stone v. Sewer Improvement Dist.*, 107 Ark. 405, 155 S. W. 99.

California. *Walker v. Los Angeles*, 23 Cal. App. 634, 139 Pac. 89; *Hunt v. Manning*, 24 Cal. App. 44, 140 Pac. 39; *Beale v. Santa Barbara* (Cal. App.), 162 Pac. 657.

Kentucky. *Long v. Barber Asphalt Paving Co.*, 151 Ky. 1, 151 S. W. 6.

Montana. *Mansur v. Palson*, 45

Mont. 585, 125 Pac. 1002; *Allen v. Butte*, 55 Mont. 205, 175 Pac. 595.

Nebraska. *Carlson v. South Omaha*, 91 Neb. 215, 135 N. W. 1047.

Washington. *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121; *Walter C. Sivyver & Sons Co. v. Spokane*, 78 Wash. 282, 137 Pac. 808; *Viegle v. Spokane*, 78 Wash. 359, 139 Pac. 33.

Sewer district.

Arkansas. *Kraft v. Smothers*, 103 Ark. 269, 146 S. W. 505.

Idaho. *Veatch v. Gibson*, 29 Idaho 609, 160 Pac. 1112.

North Dakota. *McKenzie v. Mandan*, 27 N. D. 546, 147 N. W. 808; *Ellison v. Lamoure*, 30 N. D. 43, 151 N. W. 988.

North Carolina. *Justice v. Asheville*, 151 N. C. 62, 76 S. E. 822.

Washington. *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

Each street may be made an assessment district for sewers. *Harris v. Churchill*, 152 N. Y. S. 73.

Sewer district, front foot rule for an assessment may be adopted. *Harris v. Churchill*, 152 N. Y. S. 73.

Trunk sewer district, by statute. *Brown v. Anacortes*, 79 Wash. 33, 139 Pac. 652.

Tunnel district. *Hayne v. San Francisco*, 174 Cal. 185, 162 Pac. 625.

Special district for construction of a tunnel, uniting separate districts. *Mardis v. McCarthy*, 162 Cal. 94, 121 Pac. 389.

be fixed;¹ other laws provide in general terms for their establishment, leaving it to the discretion of the proper municipal authorities, to determine the area, within certain limitations, more or less definite.²

¹ Establishment of boulevard. Benefit district fixed by charter. *Albers v. St. Louis*, 268 Mo. 349, 188 S. W. 83.

Street improvement district fixed by charter. *Granite Bituminous Paving Co. v. Fleming*, 251 Mo. 210, 158 S. W. 4; *Kennard v. Eyermann*, 267 Mo. 1, 182 S. W. 737; *Perkins v. Weber*, 251 Mo. 186, 157 S. W. 961.

Improvement district to be established within limits of charter. *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 259 Mo. 153, 168 S. W. 687; *Schneider Granite Co. v. Independent Breweries Co.*, 258 Mo. 378, 168 S. W. 693.

Sewer district; established within limits of charter required. *Jennings Heights Land & Improvement Co. v. St. Louis*, 257 Mo. 291, 165 S. W. 741.

Where statute or charter lays down manner of establishing the district it must be followed. *Missouri, K. & T. Ry. Co. v. Tulsa*, 45 Okla. 382, 145 Pac. 398.

A benefit district prescribed by charter by drawing a line midway between the street to be improved and the next parallel or converging street on each side thereof, was sustained as constitutional although irregularities and lack of uniformity were present and certain of the land therein was vacant and unimproved, since the charter required one fourth of the cost of the improvement to be assessed against the property abut-

ting on the street improved and the balance of three fourths against the property in the benefit district by the area rule. *Granite Bituminous Paving Co. v. Fleming*, 251 Mo. 210, 158 S. W. 4.

Under a charter which provides that when a street is improved a line shall be drawn through the middle of the block on each side of such street and special tax bills issued against the property within such lines, to defray the cost of the improvement, no condition can arise, when a block is divided by a recorded plat into lots which extend only to the middle or near the middle of such block, which will authorize the extension of the benefit district across the entire block so as to include not only that half of the lots which front on the street to be improved, but also the other half that fronts on the next parallel street. *State ex rel. v. St. Louis*, 234 Mo. 110, 114, 115, 135 S. W. 928.

² Limits indicated by applicable law. *Tulsa v. McCormick (Okla.)*, 164 Pac. 985.

District to be created within the limitations of the law applicable. *Marshall v. Elgin (Tex. Civ. App.)*, 143 S. W. 670.

Street improvement assessment districts; limits prescribed by charter to be followed. *Cook v. Spokane*, 69 Wash. 701, 125 Pac. 776; *Hapgood v. Seattle*, 69 Mich. 497, 125 Pac. 965.

Land omitted by mistake may

In creating such districts all mandatory and jurisdictional steps laid down in the law, of course, must be substantially observed,³ as where the consent of property owners to be affected is required as a condition to proceed, as evidenced by sufficient written petition,⁴ and notice of the establishment of the district in the manner prescribed.⁵

The district should be accurately described.⁶

be included subsequently. *Triangle Traders v. Bremerton*, 89 Wash. 214, 154 Pac. 193.

³*Johnson v. Hardin* (Mont. 1919), 179 Pac. 824; *Engelhard v. Kentucky & Indiana Construction Co.*, 162 Ky. 774, 173 S. W. 131; *Marrett v. Jefferson County Construction Co.*, 161 Ky. 845, 171 S. W. 396.

Sewers. Main sewers which drain separate districts, require a drainage district for each, by statute. *Prevo v. Hammond*, 186 Ind. 612, 117 N. E. 642.

⁴*Riddle v. Ballew*, 130 Ark. 161, 197 S. W. 27; *Meehan v. Maxwell*, 115 Ark. 594, 172 S. W. 1013; *Colquitt v. Stevens*, 111 Ark. 314, 163 S. W. 1141.

As a necessary prerequisite a majority in value of the real property owners within the district are to petition for the improvement, specifying the character of the improvement desired. *Hornwell v. White*, 115 Ark. 88, 171 S. W. 108.

The consent is to be actual or express and not implied only. *White v. Laughborough*, 125 Ark. 57, 188 S. W. 10.

Petition for; sufficiency as to signatures. *Anderson v. Pixley*, 132 Ark. 539, 201 S. W. 796.

Council by a vote of three-fourths of its members may create

a paving district without a petition of property owners to be affected. *Fitzgerald v. Sattler*, 102 Neb. 665, 168 N. W. 599.

Established by council on petition of 70% of resident property owners in district, to make improvement and assess according to benefits. Qualifications of signers. *McQueen v. Moscow*, 28 Idaho 146, 152 Pac. 799.

⁵*Pope v. Nashville*, 131 Ark. 429, 199 S. W. 101.

Ordinance creating improvement district to be published. *Gibson v. Hoxie*, 110 Ark. 544, 162 S. W. 568.

Publication of the ordinance establishing the improvement district as required by the law is mandatory and essential to the creation of a local improvement district. *McRaven v. Clancey*, 115 Ark. 163, 171 S. W. 88.

⁶*Bell v. Phillips*, 116 Ark. 167, 172 S. W. 864.

Description of, held sufficient. *Freeze v. Improvement District*, 126 Ark. 172, 189 S. W. 660.

Boundaries of, to conform with territory described in petition. *Riddle v. Ballew*, 130 Ark. 161, 197 S. W. 27.

A variance between the petition and the ordinance, and leaving it to the discretion of a municipal

Assessments are to be limited to property in the district.⁷

In the establishment of improvement districts and levying assessments on property therein benefited, within the restrictions of the applicable law, broad discretion is vested in the municipal authorities.⁸

officer to determine sidewalks to be improved renders the establishment void. *Less v. Improvement District*, 130 Ark. 44, 196 S. W. 464.

⁷ *McCaffrey v. Omaha*, 91 Neb. 184, 135 N. W. 552, 136 N. W. 343.

Property not within the benefit district, of course, is not assessable. *Springfield v. Owen*, 262 Mo. 92, 170 S. W. 1118; *People v. Waldorf*, 217 N. Y. 96, 111 N. E. 467, reversing 153 N. Y. S. 1072, 168 App. Div. 473.

⁸ The power to determine the taxing district for any particular burden "is purely a legislative power." *People v. Waldorf*, 153 N. Y. S. 1072, 168 App. Div. 473.

In event of mere difference of opinion, courts will not interfere. *Re Boyer Avenue*, 79 Wash. 664, 141 Pac. 58.

The municipality may exercise a broad discretion and in the absence of fraud, arbitrary action or "demonstrable mistake," the courts will not interfere. *Springfield v. Owen*, 262 Mo. 92, 170 S. W. 1118, 1120, citing § 2052, vol. 5, ante.

Property to be embraced within the improvement or taxing district is to be determined by the law making power and cannot be controlled by the courts. *Marshall v. Elgin* (Tex. Civ. App.), 143 S. W. 670.

All property benefited by a local improvement need not be included within the assessing area. The whole cost may be assessed against the abutting property. *Moore v. Yonkers*, 235 Fed. 485, 490, 149 C. C. A. 31.

Determination by the council that the property within the assessment district created by ordinance would be benefited by a local improvement is a legislative act, which will not be reviewed judicially in the absence of fraud or arbitrary action. *Great Northern Ry. Co. v. Seattle*, 73 Wash. 576, 132 Pac. 234.

"Assessment districts must have a point of beginning and a point of termination. The fixing of these extremes often presents many perplexing questions upon which there would be a never ending variety of opinions. It is, therefore, of the first importance that some definite rule be laid down for the guidance of trial courts. The best that has been announced, and the only practicable working rule is that the courts should not change the districts established by the commissioners, except where the commissioners have acted arbitrarily or fraudulently or have proceeded upon a fundamentally wrong basis." *Spokane v. Miles*, 72 Wash. 571, 131 Pac. 206; *Spokane v. Kraft*, 67 Wash. 245; 121 Pac. 830.

It has been uniformly held that the action of the city legislature in pursuance of charter powers in establishing a district to be benefited by local public improvements so as to justify a special assessment against property lying within the district is conclusive in the absence of any evidence that it was procured by fraud or proof that it is manifestly arbitrary or unreasonable, or that the assessment is palpably unjust and oppressive.⁹

§ 2053. Sewers and drains.¹⁰

Power conferred by a charter to assess the cost of sewer construction upon the property directly benefited necessarily implies the authority to define the area to be drained. That which is implied in a law is as much a part thereof as what is expressed.¹¹

⁹ Jennings Heights Land & Improvement Co. v. St. Louis, 257 Mo. 291, 165 S. W. 741.

"It must be presumed that the council, in establishing the district of assessment in connection with the improvement, exercised its judgment, and did establish a district of assessment containing all the property likely to be benefited by the improvement. In doing this the council plainly performed a legislative act, and its action is conclusive in the absence of fraud or bad faith." Govers v. New Rochelle, 159 N. Y. S. 221, 95 Misc. Rep. 352.

¹⁰ Arizona. Globe v. Willis, 16 Ariz. 378, 146 Pac. 544.

Georgia. Neal v. Decatur, 142 Ga. 305, 82 S. E. 546.

Illinois. Chicago v. Sullivan Machinery Co., 269 Ill. 58, 109 N. E. 696.

Iowa. Williams v. Cherokee (Ia. 1918), 169 N. W. 110.

Kentucky. Bayes v. Paintsville,

166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027.

Missouri. Mullins v. Mt. St. Mary's Cemetery Ass'n, 268 Mo. 691, 187 S. W. 1169.

New Jersey. St. Vincent's Church v. Madison Borough, 85 N. J. L. 131, 89 Atl. 254, reversed in 86 N. J. L. 567, 92 Atl. 348.

New York. Re Fowler Street, New York City, 153 N. Y. S. 585.

N. Dakota. McKenzie v. Mandan, 27 N. D. 546, 147 N. W. 808.

Washington. Appeal of North Yakima, 87 Wash. 279, 151 Pac. 795.

Wisconsin. Sales v. Hartford, 161 Wis. 136, 152 N. W. 853.

Assessment to secure sewer outlet may be levied. Kraft v. Smothers, 103 Ark. 269, 146 S. W. 505.

¹¹ Rogers v. Salem, 61 Ore. 321, 122 Pac. 308.

Assessment districts may be established. Viegles v. Spokane, 78

The determination by appropriate municipal authorities of property to be benefited by a sewer is a legislative question and ordinarily not subject to review by the courts in the absence of fraud or arbitrary action.¹²

It is sometimes held that notice in adopting plans and prescribing limits need not be given to taxpayers, since the construction of a sewer is the exercise of the police power for the health and cleanliness of the municipality, and such power is exercised solely at the legislative will, and the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion.¹³

§ 2054. Property beyond municipal area.¹⁴

Wash. 359, 139 Pac. 33, § 2052, ante.

Assessments on property in sewer district. *McGhee v. Walsh*, 249 Mo. 266, 155 S. W. 445.

12 Appeal of North Yakima, 87 Wash. 279, 151 Pac. 795.

Effect of absence of benefit to the abutting property for sewer construction. *Lyon v. Hyattsville*, 125 Md. 306, 93 Atl. 919.

Railroad property. *Georgia R. & B. Co. v. Decatur*, 137 Ga. 537, 75 S. E. 830; *Georgia Ry. & El. Co. v. Atlanta*, 144 Ga. 722, 87 S. E. 1058.

Land benefited, not abutting may be assessed. *Graham v. Grand Rapids*, 179 Mich. 378, 146 N. W. 248.

Property on line of sewer not benefited is not subject to assessment. *Murphy v. Summersett*, 84 Wash. 565, 147 Pac. 199, 204, 205.

Land liable for assessment only when it is adjacent, near to, or abuts or comes in physical contact with the sewer. *Gary v. Gary Oakhill Cemetery Ass'n*, 186 Ind. 446, 116 N. E. 741.

Benefit on real estate and public health. Lateral sewers connecting lands with the main sewer serve to drain away refuse that endanger public health. *Whitsett v. Carthage*, 270 Mo. 269, 284, 285, 193 S. W. 21.

Assessment of cost of sewer according to the frontage of each parcel is not a taking of private property without due process of law and contrary to the 14th amendment of the United States Constitution. *Lyon v. Hyattsville*, 125 Md. 306, 93 Atl. 919.

"A sewer or the need of a sewer may involve or affect the whole city; it is not of necessity, nor as a fact, a matter of purely local concern." *Re Sewer in Kissel Ave.*, 143 N. Y. S. 467, 471, 81 Misc. Rep. 541.

13 *Rogers v. Salem*, 61 Ore. 321, 122 Pac. 308.

14 Assessments to secure sewer outlet beyond municipal limits authorized. *Kraft v. Smothers*, 103 Ark. 269, 146 S. W. 505; § 1434, ante; § 1434, vol. 4, ante.

Legislature may grant city power

§ 2056. Property abutting.¹⁵

to levy assessments on property without the municipal area which is within the assessment district. *Indianapolis v. Bryan* (Ind. 1919), 125 N. E. 38.

Without express grant a municipality has no extraterritorial jurisdiction. "It cannot levy an assessment upon lands beyond its limits to pay for an improvement undertaken as a municipal improvement, even though it should be confessed that such outside lands were directly benefited. The power to levy an assessment upon lands benefited must be held to be a power to be exercised upon lands that are subject to municipal control." *Edmonds Land Co. v. Edmonds*, 66 Wash. 201, 119 Pac. 192.

Construction of a street part of which was beyond the town limits, authorized under the special circumstances. *Ketchikan v. Zimmerman*, 4 Alaska 336.

¹⁵ *Colorado. Phipps v. Denver*, 57 Colo. 205, 140 Pac. 797.

Georgia. Wing v. Macon, 142 Ga. 384, 82 S. E. 1062.

Iowa. Kneebbs v. Sioux City, 156 Iowa 607, 137 N. W. 944; *Williams v. Cherokee* (Ia. 1918), 169 N. W. 110; *Des Moines City Ry. Co. v. Des Moines* (Ia.), 159 N. W. 450.

Kentucky. Bayes v. Paintsville, 166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027.

Louisiana. Shreveport v. Shreveport Traction Co., 134 La. 568, 64 So. 414.

Michigan. Lansing v. Jenison, 201 Mich. 491, 167 N. W. 947.

New York. People v. Waldorf, 153 N. Y. S. 1072, 168 App. Div. 473.

N. Carolina. Marion v. Pilot Mountain, 170 N. C. 118, 87 S. E. 53.

Oregon. Hagenberger v. Milwaukie, 83 Ore. 298, 163 Pac. 595.

Oklahoma. Missouri, Kansas & Texas Ry. Co. v. Tulsa, 45 Okla. 382, 145 Pac. 398.

Pennsylvania. Philadelphia v. Conway, 256 Pa. 172, 101 Atl. 472; *Philadelphia v. Ginhart*, 48 Pa. Super. Ct. 648.

Wisconsin. Superior v. Lake Superior T. & T. Ry. Co., 152 Wis. 389, 140 N. W. 26.

Statute contrary to ordinance. *State ex rel. v. Chillicothe*, 237 Mo. 486, 141 S. W. 602.

Boulevard establishment. *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 168 S. W. 721.

Railroad property abutting on sewer, held liable. *Decatur v. Georgia R. & Banking Co.*, 137 Ga. 537, 73 S. E. 830.

A railroad right of way over a street, held not to border or abut upon the street, or anything else. *Chicago, M. & St. P. Ry. Co. v. Poland*, 54 Mont. 497, 172 Pac. 541.

"It is not essential to abutting upon a street that any entire boundary of the land should lie along or touch the street." *People v. Waldorf*, 153 N. Y. S. 1072, 168 App. Div. 473.

§ 2058. Property fronting.¹⁶

The term "frontage" is merely an expression of the "front foot rule," and under such rule no other property than that abutting on the street improved can be assessed.¹⁷

But where a lot or parcel of land has a frontage on the improvement, some laws contemplate that the whole lot or parcel should be subject to assessment in the proportion of its frontage on the street. Each lot or parcel so abutting is treated as an assessable unit or entity, and usually no legal provision is made for the subdivisions of such units to meet the exigencies of particular cases.¹⁸

§ 2059. Property contiguous, adjoining or adjacent.¹⁹

If the charter limits the property that can be charged for the expense of a street improvement to that which is contiguous to, or abutting, or fronting upon the street to be improved, clearly assessments can not be levied upon property not embraced within such description, or non-abutting property.²⁰

It is now well settled in most jurisdictions that adjacent property may be specially assessed to defray, in whole or in part, the cost of local improvements by which such property is especially benefited. That doctrine is based for its final reason on enhancement of values.²¹

¹⁶ Chicago, M. & St. P. Ry. Co. v. Poland, 54 Mont. 497, 172 Pac. 541; Municipal Securities Corp. v. Metropolitan St. Ry. Co., 196 Mo. App. 518, 196 S. W. 400; Birnie v. La Grand, 78 Ore. 531, 153 Pac. 415, citing § 2058, vol. 5, ante.

Only fronting property chargeable. Kingshighway Supply Co. v. Banner Iron Works, 266 Mo. 138, 150, 181 S. W. 30.

¹⁷ Chillicothe v. Henry, 136 Mo. App. 468, 472, 118 S. W. 486.

¹⁸ Rockcliffe-Gibson Const. Co. v. Zeilda Forsee Inv. Co., 179 Mo. App. 229, 231, 166 S. W. 849.

¹⁹ State ex rel. v. Chillicothe, 237 Mo. 486, 141 S. W. 602.

²⁰ Birnie v. La Grand, 78 Ore. 531, 153 Pac. 415, citing § 2059, vol. 5, ante.

Railroad right of way between two avenues is contiguous to both, and may be assessed as a whole. Kankakee v. Illinois Central R. Co., 258 Ill. 368, 101 N. E. 592, 594.

²¹ Cote v. Highland Park, 173 Mich. 201, 139 N. W. 69, 71; Clark v. Salem, 61 Ore. 116, 121 Pac. 416.

Adjacent. Superior v. Lake Su-

§ 2060. Property not abutting on part of street improved.²²

§ 2062. Property benefited.

Authority to levy assessments on property to be deemed benefited by the improvement, is power to assess property for the construction of a sewer which receives special benefit therefrom, although not abutting thereon.²³

So power to raise tide and swamp lands at the cost of property benefited permits the assessment to cover all property benefited by the improvement, regardless of whether the benefited property is or is not specifically improved.²⁴

Where property of a city is benefited by an improvement it may be assessed.²⁵

§ 2062a. Property devoted to public use.

Apart from constitutional or statutory authorization public property used for public purposes is not liable to special assessment for local improvements,²⁶ e. g.,

Superior T. & T. Ry. Co., 152 Wis. 389, 140 N. W. 26.

Adjacent tracts. Buckingham v. Kess (Ind. App.), 120 N. E. 422.

"Adjacent" is lying near, close at hand, adjoining, bordering, that which is near or bordering upon, adjoining, contiguous. Gary v. Gary Oakhill Cemetery Ass'n, 186 Ind. 446, 116 N. E. 741; Johnson v. Davenport Brick & Tile Co., 237 Fed. 668; Dunker v. Des Moines, 156 Iowa 292, 136 N. W. 536.

The term "adjacent" includes property in the neighborhood of the improvement though not actually touching thereon. Clark v. Salem, 61 Ore. 116, 121 Pac. 416.

"Adjacent property" includes lands, while not immediately abutting on the improvement, lie so near thereto as to be benefited by it. Lapp v. Marshfield, 72 Ore. 573, 144 Pac. 83.

The word adjacent signifies ly-

ing near to, but not actually touching, the improvement, but separated therefrom by an intervening parcel or strip. Superior v. Lake Superior T. & T. Ry. Co., 152 Wis. 389, 140 N. W. 26.

²² Spokane v. Fonnell, 75 Wash. 417, 135 Pac. 211; Re Fowler Street, New York City, 153 N. Y. S. 585.

Property not abutting on the improvement can not be assessed. Cooper v. Bellevue Borough, 51 Pa. Super. Ct. 597.

²³ Graham v. Grand Rapids, 179 Mich. 378, 146 N. W. 248.

²⁴ Martin v. Olympia, 69 Wash. 28, 124 Pac. 214.

²⁵ "Under a jurisprudence now fairly well settled." Shreveport v. Weiner, 134 La. 800, 64 So. 718.

²⁶ Lands held for public use. Bronx Parkway Com. v. Yonkers, 175 N. Y. S. 207.

county property.²⁷ This, it appears, is the general rule, supported by judicial judgments.

A city owning property, it has been held, may be assessed, where it occupies "the position of an ordinary abutting owner."²⁸

§ 2062b. Same—telephone exchange.

Where there is nothing that in a legal sense implies the permanent devotion of a telephone company's property

State lands, liable by statute under certain conditions. *State v. Savidge*, 95 Wash. 240, 163 Pac. 738.

State lands within corporate limits upon which there is an armory site, held liable for special benefits. *Trimble v. Seattle*, 93 Wash. 472, 161 Pac. 381.

Railroad property, as public use, and therefore not assessable for local improvements. *Re Seneca Ave.*, New York City, 163 N. Y. S. 503, 98 Misc. Rep. 712.

Railroad right of way. *New York, N. H. & H. R. Co. v. Port Chester*, 134 N. Y. S. 883, 149 App. Div. 893.

Land of railroad company used as park, held not exempt. *Lincoln v. Chicago & A. R. Co.*, 262 Ill. 11, 104 N. E. 277.

27 Public property used for public purposes, in the absence of express constitutional or legislative authority, cannot be sold to satisfy a debt of any kind. Without express authority by statute, county property cannot be assessed. *Mt. Sterling v. Montgomery County*, 152 Ky. 637, 153 S. W. 952.

County property is exempt unless power to assess is expressly conferred. "The principle is well settled in this state that tax laws do not apply to the property of the

state, or any of the arms of the state government, unless they are specially mentioned therein and made subject thereto." *Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796.

Act held conferred no power to assess county property on which the county court house is situated. *Alachua County v. Gainesville*, 67 Fla. 506, 65 So. 653.

County is not liable for paving in front of the court house under a law exempting property owned by the state. *Grenada v. Grenada County*, 115 Miss. 831, 76 So. 682.

Legislature may give power to city to levy assessment against county property within the corporate limits and used for governmental purposes. *Gainesville v. Alachua County*, 69 Fla. 581, 68 So. 759, approving *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421. Question considered in *Anderson v. Ocala*, 67 Fla. 204, 64 So. 775, 52, L. R. A. (N. S.) 287.

County property within the city held liable. *Board of Commissioners, etc., v. Colorado Springs (Colo. 1919)*, 180 Pac. 301, 303, 304, rejecting the theory that a county is a part of the sovereignty.

²⁸ *Shreveport v. Weiner*, 134 La. 800, 64 So. 718.

City may determine that none

to a public use, it may be assessed for improvements—the assessment to be measured by the increase in the market value of the land, and it is not limited to the benefit conferred on the company for its use of the property.²⁹

But “land acquired under a legislative sanction that implies its permanent devotion to a public use cannot, without a violation of such public use, have a market for any other purpose, and hence as such a violation will not be presumed, such land has, in legal contemplation, no market value to be enhanced.”³⁰

§ 2062c. Leaseholds.

Land leased may be taxed for local improvements; the assessment is a tax on the interest of the lessee.³¹

Legislation sometimes authorizes special assessments to be levied on leasehold interests held by private persons in and to tide lands owned by the state where such leasehold interests are benefited by a special improvement.³²

However, a statute authorizing an assessment on leasehold interests in tide lands can not be held to authorize an assessment on a leasehold interest in and to harbor areas.³³

of its property shall be assessed for an improvement. *Spokane v. Curtis*, 66 Wash. 555, 120 Pac. 70.

City liable where its property is benefited, otherwise, like a private owner, it is not. *Spokane v. Miles*, 72 Wash. 571, 131 Pac. 206.

²⁹ *New York Tel. Co. v. Newark*, 90 N. J. L. 362, 101 Atl. 391.

³⁰ *Morris & Essex R. R. v. Jersey City*, 36 N. J. L. 56.

³¹ *Granite State Land Co. v. Hampton*, 77 N. H. 179, 89 Atl. 842.

Benefits to leasehold interest. *Cahill v. Baltimore*, 129 Md. 17, 98 Atl. 235.

³² Assessments for benefits on property leased by the state, held constitutional as not an impairment of an implied covenant in the lease that the lessor should pay such assessment. *Trimble v. Seattle*, 231 U. S. 683, 34 Sup. Ct. 218, 58 L. ed. 435, affirming 64 Wash. 102, 116 Pac. 647.

³³ *North American Lumber Co. v. Blaine*, 81 Wash. 13, 142 Pac. 438.

Tide lands owned by private persons are assessable in like manner as any other private property to pay the costs of local improvements, while harbor areas and leasehold interest therein are not

IV. PROPERTY EXEMPT FROM ASSESSMENT.

§ 2063. Power to exempt—construction.³⁴

It is settled that, in the absence of constitutional restriction, the legislative power to exempt property from taxation extends to every form of the taxing power, including special assessments as well as general taxes.³⁵

A constitutional restriction of legislative exemptions from taxation was held not to include special assessment.³⁶

An exemption from taxation must be in clear and unambiguous language and appear to be indisputable within the intention of the legislature. Exemptions are to be

assessable to pay the costs of local improvements. *North American Lumber Co. v. Blaine*, 89 Wash. 366, 154 Pac. 446.

³⁴ **Exemption of public property** used for public purposes, held not applicable to special assessments for local improvements. *Mt. Sterling v. Montgomery County*, 152 Ky. 637, 153 S. W. 952.

Exempting a park from special assessment for the construction of a sewer, by the action of municipal authorities, held not to show bad faith. *Prendergast Const. Co. v. Goldsmith*, 273 Mo. 184, 201 S. W. 354.

County property cannot be assessed, although not specially exempted, as a county as an arm of the state. *Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796.

City cannot impose liability on a county or courthouse property for paving a street in front of it, under a statute exempting property "owned by the state," which, as adjudged by the court, "inferentially includes as exempt also

property of a county of the state." "It is well settled that no suit can be maintained against a county to recover for liability unless such liability is authorized by some statute, expressly or by necessary implication." *Grenada v. Grenada County*, 115 Miss. 831, 76 So. 682. ³⁵ *Los Angeles County Flood Control District v. Hamilton*, 177 Cal. 119, 169 Pac. 1028.

Statute allowing exemptions to those who make conveyances or land to the municipality for street improvements, held valid and constitutional, notwithstanding it results in heavier assessments upon other property. *Re Spuyten Duyvil Road*, New York City, 150 N. Y. S. 405, 87 Misc. Rep. 635; *Re Tibbett Ave.*, New York City, 147 N. Y. S. 333, 162 App. Div. 398.

³⁶ Under a constitution forbidding the legislature from granting any exemption except from taxation, held legislative act exempting from special assessments property of a park commission was not unconstitutional, since special assessments are not 'taxation and as-

strictly construed,³⁷ and in case of doubt the doubt must be resolved in favor of the state or municipality "in obedience to that fundamental principle of government which requires that the burdens of taxation be equally borne by all."³⁸

Accordingly it is generally held that exemptions, either by constitution or statute, from taxation do not embrace exemptions from local assessment or special taxation.³⁹

§ 2064. Religious and charitable institutions.⁴⁰

assessment" meant. *South Park Comrs. v. Wood*, 270 Ill. 263, 110 N. E. 349, 353, 354.

³⁷ *Re Ransom*, 149 N. Y. S. 1056, 1059, 87 Misc. Rep. 1.

In the absence of express exemption, the exemption from local assessments will not be presumed and any law to that effect will be strictly construed. *Gary v. Gary Oakhill Cemetery Assn.*, 186 Ind. 446, 116 N. E. 741, 743.

"Exemption from taxation or from an assessment which is spread over other lands within the assessment district is something which the law will not uphold, except when clearly required by some legal or statutory rule. Where the law authorizes a special assessment on lands without providing any exception because of the use to which such property is put, it is beyond the proper province of the court to create such an exception." *Des Moines City Ry. Co. v. Des Moines (Ia.)*, 159 N. W. 450, 454.

³⁸ *Mount Olive Borough v. First German, etc., Congregation*, 51 Pa. Super. Ct. 343.

³⁹ *Indiana. Gary v. Gary Oakhill Cemetery Assn.*, 186 Ind. 446, 116 N. E. 741, 743; *Windfall City*

v. Somerville, 181 Ind. 463, 104 N. E. 859.

Kansas. Wichita v. Wichita Board of Education, 92 Kan. 967, 142 Pac. 946.

Missouri. Thogmartin v. Nevada School District, 189 Mo. App. 10, 13, 176 S. W. 473.

Montana. Kalispell v. School District, 45 Mont. 221, 122 Pac. 742.

S. Carolina. Wesley M. E. Church v. Columbia, 105 S. C. 303, 89 S. E. 641.

See annotation on "exemption from taxation as including exemption from assessment for local improvements." *Eight British Ruling Cases*, pp. 179 to 208.

"A clear line of demarcation has been drawn in interpreting this exemption between the burdens arising from the general tax levied to carry on the instrumentalities of government and a pecuniary imposition laid to reimburse the public treasury in whole or in part for the specific advantage arising from local improvements." *Williams College v. Williamstown*, 219 Mass. 46, 106 N. E. 687; *Garden Cemetery Assn. v. Baker*, 218 Mass. 339, 105 N. E. 1070.

⁴⁰ Charitable institution, held

§ 2065. Educational institutions.⁴¹**§ 2066. Cemeteries and burial grounds.**

Aside from valid constitutional or statutory exemption, according to the weight of authority, burial grounds

exempt. *Brooklyn Children's Aid Soc. v. Prendergast*, 151 N. Y. S. 720, 166 App. Div. 852.

Cemetery, held not a charitable institution, and therefore its property was not exempt from special assessment. *Chicago v. Kehilath Anshe Mayriv*, 284 Ill. 210, 119 N. E. 905.

Church. *Schuylkill Haven Borough v. Trinity Church*, 62 Pa. Super. Ct. 413.

Exemption of churches from taxes does not exempt from special assessments. *Wesley M. E. Church v. Columbia*, 105 S. C. 303, 89 S. E. 641, relying on *Illinois Central R. Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132.

⁴¹ Exemption from taxes is not applicable to special assessments. *Windfall City v. Somerville*, 181 Ind. 463, 104 N. E. 859.

School property, held not exempt, as special assessments for municipal improvements are not taxes within the meaning of constitutional and statutory tax exemption provisions. *Kalispell v. School District*, 45 Mont. 221, 122 Pac. 742.

School property used for school purposes, held subject to special assessment. *Wichita v. Wichita Board of Education*, 92 Kan. 967, 142 Pac. 946.

Public school property held not subject to special assessment for local improvements. *St. Louis County v. Duluth Board of Educa-*

tion, 133 Minn. 386, 158 N. W. 635.

A statute making "all lands owned by any city, and all other public lands, cemeteries and railroad rights of way fronting or abutting on the improvement," liable for special assessments for street improvements, held not to include public schools, since a school district is not a part of a county, nor is it a municipal corporation; the title to its property is vested in the school district as a public, and not as a municipal corporation; it is a separate corporation, having no connection with the municipality in which it exists; moreover school grounds are not "public lands" as ordinarily understood. *Thogmartin v. Nevada School District*, 189 Mo. App. 10, 13, 14, 176 S. W. 473.

Lands used by a state university for university purposes is not assessable. Strip of land adjoining land used for the purpose of education not capable of being severed therefrom, without injury to that devoted, to educational uses, held not subject to street improvement assessment. *Raisch v. Regents of University* (Cal. App.), 174 Pac. 943.

Vacant property of University of Michigan, held subject to assessment under a statute. *Re Auditor General* (Mich.), 165 N. W. 771.

and the property of cemetery associations are liable to special assessment for local improvements in like manner as other property,⁴² since, as stated, exemption from taxation in general has no application whatever to such exactions.⁴³

Statutes may exempt cemeteries from assessments for local improvements.⁴⁴

⁴² *People ex rel. v. Bloomington Cemetery Assn.*, 266 Ill. 32, 107 N. E. 143, relying on *Bloomington Cemetery Assn. v. People*, 139 Ill. 16, 28 N. E. 1076; *Garden Cemetery Corp. v. Baker*, 218 Mass. 339, 105 N. E. 1070; *Mullins v. Mt. St. Mary's Cemetery Assn.*, 239 Mo. 681, 144 S. W. 109; Cases in note Ann. Cas. 1912A, 1047 et seq.

Contra, *Cave Hill Cemetery Assn. v. Gosnell*, 156 Ky. 599, 161 S. W. 980.

Cemetery property, held chargeable under *Kansas City Charter* with its cost of the construction of a district sewer. *Mullins v. Mt. St. Mary's Cemetery Assn.*, 259 Mo. 142, 168 S. W. 685.

⁴³ Section 2063, ante; § 2063, vol. 5, ante.

Gary v. Gary Oakhill Cemetery Assn., 186 Ind. 446, 116 N. E. 741, 743; *Mullins v. Mt. St. Mary's Cemetery Assn.*, 268 Mo. 691, 187 S. W. 1169.

Cemetery owned and operated by a religious corporation held not exempt from assessment under a particular statute. *Re Front Street Sewer Assessment (Minn.)*, 163 N. W. 978.

Lands used exclusively as a cemetery where lots therein are sold, and in some instances graves are given to persons unable to purchase lots, held not a charitable institu-

tion, and hence, liable to special assessment. *Chicago v. Kehilath Anshe Mayriv*, 284 Ill. 210, 119 N. E. 905.

Land devoted to the purposes of a burial ground and belonging to a private corporation, not obligated to perform public duties, is liable to an assessment for street watering made by statute if it is benefited thereby. *Garden Cemetery Corp. v. Baker*, 218 Mass. 339, 105 N. E. 1070, distinguishing *Mt. Auburn Cemetery v. Cambridge*, 150 Mass. 12, 22 N. E. 66, 4 L. R. A. 836.

⁴⁴ *Re Starr St.*, 131 N. Y. S. 71, 73 Misc. Rep. 380; *Cave Hill Cemetery Co. v. Gosnell*, 156 Ky. 599, 161 S. W. 980.

Law exempting, held constitutional. *St. Paul v. Oakland Cemetery Assn.*; *Re Magnolia Street Sewer*, *St. Paul*, 134 Minn. 441, 159 N. W. 962.

Under a statute exempting "places of burial not used or held for private or corporate profit," it was held that a cemetery owned by an incorporated church congregation, which sells lots to members and non members, was not exempt. *Mount Olive Borough v. First German, etc., Congregation*, 51 Pa. Super. Ct. 343.

Cemetery property exempt "by virtue of a settled state policy

The New York statute has generally been construed to mean that no assessment can be levied against cemetery property, not even to take effect when the land ceases to be used as a cemetery.⁴⁵

Property acquired for cemetery purposes under that statute is exempt from the time of its acquisition, even though not used, and it is not essential, to insure exemption that graves should be in it;⁴⁶ and the same rule holds even after burials in the property have been prohibited by lawful ordinance.⁴⁷

§ 2067. Homestead property.⁴⁸

§ 2069. Exemption by agreement.⁴⁹

evidenced by the provisions in the charter of complainant (cemetery) and in other statutes," of Michigan, as held by four judges, while the other four held the contrary. *Woodmere Cemetery Assn. v. Detroit*, 192 Mich. 553, 159 N. W. 383, 385-387.

Land of cemetery outside the cemetery ground bordering on a street is liable to assessment. *Northern Light Lodge v. Monoma*, 180 Iowa 62, 161 N. W. 78.

⁴⁵ *Re Grandview Ave., New York City*, 165 N. Y. S. 238.

Lands of an ancient church, held exempt under New York statute from assessment for opening a street where it was the early custom to bury the dead under the church building and also in the burial grounds attached thereto. *Re Trustees of Reformed P. D. Church*, 165 N. Y. S. 459, 100 Misc. Rep. 143.

⁴⁶ *People ex rel. v. Stillwell*, 190 N. Y. 284, 291, 292, 83 N. E. 56; *Re Perry Ave.*, 103 N. Y. S. 1069, 118 App. Div. 874, 877; *Re Jerome Ave., New York City*, 192 N. Y.

459, 85 N. E. 755; *Re Starr St.*, 131 N. Y. S. 71, 73 Misc. Rep. 380, affirmed 147 N. Y. S. 1143, 163 App. Div. 917, affirmed 212 N. Y. 606, 106 N. E. 1043.

⁴⁷ *Re Grandview Ave., New York City*, 165 N. Y. S. 238; *People ex rel. v. Pratt*, 129 N. Y. 68, 29 N. E. 7.

⁴⁸ "The general rule is that the fact that the property assessed for the cost of a local improvement is a homestead does not defeat the assessment lien or prevent a sale in satisfaction thereof." *Patterson v. Wallace (Okl.)* 147 Pac. 1034, L. R. A. 1915E, 662.

In Texas the constitution exempts homesteads from forced sale for the payment of assessments for local city improvements. *Dallas v. Atkins (Tex. Civ. App.)*, 197 S. W. 593, 601, following *Higgins v. Bordages*, 88 Tex. 458, 31 S. W. 52, 53 Am. St. Rep. 770, set out in § 2067, vol. 5, ante.

⁴⁹ *California. Ransome-Crummey Co. v. Coulter*, 177 Cal. 574, 171 Pac. 308.

Georgia. Neal v. Decatur, 142

V. EXERCISE OF POWER.

§ 2070. Municipal officers empowered to make assessments.

Only the officers or boards designated by the law applicable are authorized to take the essential steps and make the assessment.⁵⁰

Ga. 205, 82 S. E. 546; Atlanta v. Akers, 145 Ga. 680, 89 S. E. 764.

Illinois. Decatur v. Pryor, 267 Ill. 221, 108 N. E. 61.

Missouri. Miners' Bank v. Clark, 252 Mo. 20, 158 S. W. 597.

Mississippi. Kimball v. Jackson, 118 Miss. 789, 80 So. 3.

New York. Re Lawrence Street, New York City, 136 N. Y. S. 845; Re Hebbard Avenue, New York City, 150 N. Y. S. 462; Re Spuyten Duyvil Road, New York City, 150 N. Y. S. 405, 87 Misc. Rep. 635.

Re Fowler Street, New York City, 153 N. Y. S. 585.

Oregon. Colby v. Medford, 85 Or. 485, 167 Pac. 487.

Washington. Re Patterson, 98 Wash. 334, 167 Pac. 924; H. S. Turner Inv. Co. v. Seattle 70 Wash. 201, 126 Pac. 426, 41 L. R. A. (N. S.) 781; Gerard v. Seattle, 73 Wash. 519, 132 Pac. 227.

Property had paid for an elevated road under a charter provision that the property was thereafter to be exempt from special assessments on account of the maintenance of a street in the future. Held, an assessment for an additional improvement might be made under an amended charter, as it did not constitute a violation of any contract. Hochfeld v. Portland, 72 Or. 190, 142 Pac. 824, approving Ladd v. Portland, 32 Or. 271, 51 Pac. 654, 67 Am. St. Rep. 526.

⁵⁰ Auburn v. Paul, 110 Me. 192, 85 Atl. 571; Belmont Land Assn. v. Garfield Borough, 90 N. J. L. 394, 103 Atl. 682; Casey v. Cincinnati H. & D. Ry. Co., 263 Ill. 352, 105 N. E. 130.

Law applicable, of course, controls. Appeal of Dellaripa, 88 Conn. 565, 92 Atl. 116.

Board of supervisor as a board of equalization holds hearing, and council is notified which makes the assessment; held due process of law. Farncomb v. Denver (Colo. 1918), 171 Pac. 66; Londoner v. Denver, 52 Colo. 15, 119 Pac. 156.

By council and commissioners. Re Seattle, 66 Wash. 327, 119 Pac. 852.

By assessing board and council. Veatch v. Gibson, 29 Idaho 609, 160 Pac. 1112.

Benefits to be determined by jury, held law constitutional. Jury may find benefits equal amount of assessment. Re Main Street (Mo.), 198 S. W. 821.

Under Greater New York Charter. Re Sewer in Kissel Ave., 143 N. Y. S. 467, 81 Misc. Rep. 541; Young v. Wenz, 218 N. Y. 329, 113 N. E. 334, 157 N. Y. 1151, 166 App. Div. 937.

Commissioners are not disqualified because they represent the municipality. Pierce v. Huntsville, 185 Ala. 490, 64 So. 301.

Aldermen, subject to mayor's

§ 2071. Same—commissioners.

In condemnation to acquire lands for streets and other public purposes commissioners are usually selected in the manner provided to examine the property and determine the benefits and assessments.⁵¹

In the performance of the duties imposed the commissioners, to validate the assessment, must follow in substance all mandatory requirements of the law.⁵²

§ 2074. Notice of assessment to property owners.⁵³

It is essential that property owners should be given notice and an opportunity to be heard, to test the validity

veto. *Jewett v. Medford* (Mass. 1919), 123 N. E. 347.

Interest of officers who make the assessment due to ownership of real estate affect thereby, held not a disqualification. *Federal Const. Co. v. Curd* (Cal. 1918), 177 Pac. 469.

⁵¹ *Belmont Land Assn. v. Garfield Borough*, 90 N. J. L. 394, 103 Atl. 682.

Law authorizing special commissioners to ascertain assessments to be levied to defray expenses of street improvement is constitutional. *Dallas v. Atkins* (Tex. Civ. App.), 197 S. W. 593.

Special assessment commission; power to determine the amount of the benefits to the various properties and levy the assessments; appeal to city council from acts of commissioners. The commission is in the first instance vested with the power to fix, not only the benefits, but the amount of the assessment each property should be required to pay; and the council has power to review and correct the errors of the commission. The commission exercises functions judicial in

their nature. When the commission has acted, in all respects within their power, their decision is final, except for fraud, "or other grounds justifying equitable interference." *Ellison v. Lamoure*, 30 N. D. 43, 151 N. W. 988.

⁵² As inspection of the property, and cause to be made a complete list of both the benefits and the assessments, "setting forth each tract of land assessed and the amount such lot is benefited by the improvement and the amount assessed against it." The doing of these things and the finding of these facts are "fundamental to the levying, the confirmation, and the validity of any assessment." *Robertson Lumber Co. v. Grand Forks*, 27 N. D. 556, 147 N. W. 249; *McKenzie v. Mandan*, 27 N. D. 546, 147 N. W. 808.

⁵³ *Alabama. Birmingham v. Wills*, 178 Ala. 198, 59 So. 173.

Maryland. Leser v. Wagner, 120 Md. 671, 87 Atl. 1040.

Missouri. St. Louis v. Bell Place Realty Co., 259 Mo. 126, 168 S. W. 721; *Springfield v. Owen*, 262 Mo. 92, 170 S. W. 1118.

and fairness of the assessment, at some stage of the proceedings prior to the final fixing of the assessment.⁵⁴

Texas. *Texas Bitulithic Co. v. Abilene Street Ry. Co.* (Tex. Civ. App.), 166 S. W. 433; *Gallahar v. Whitley* (Tex. Civ. App.), 190 S. W. 757.

Utah. *Jones v. Foulger*, 146 Utah 419, 150 Pac. 933.

Washington. *Spokane v. Pittsburg Land & Imp. Co.*, 73 Wash. 693, 132 Pac. 633; *Trimble v. Seattle*, 93 Wash. 472, 161 Pac. 381.

To validate notice of hearing must be given, when required. *Mt. Carmel v. Risley*, 263 Ill. 299, 104 N. E. 1035; *People ex rel. v. Smith*, 216 N. Y. 95, 110 N. E. 174, reversing 152 N. Y. S. 295, 166 App. Div. 406; *Haggart v. Alton*, 29 S. D. 509, 137 N. W. 372.

Notice to property owner is mandatory. *Haggart v. Alton*, 29 S. D. 509, 137 N. W. 372.

Connection with water mains may be made at expense of property, prior to permanent improvement of street; by notice to owners to make, and in event of default, by the city and assess cost thereof against property in a summary manner. Held, valid as this is an exercise of the police power. *Angola v. Croxton* (Ind.), 112 N. E. 385.

Cost of extending water system by assessments which become a lien on the property. Sending bill is not a prerequisite to filing a lien. *Philadelphia v. Price*, 62 Pa. Super. Ct. 557.

Where notice as to all steps have been given, failure to give of the apportionment of the assess-

ments into installments, as required, held not substantial error. *Young v. Wenz*, 218 N. Y. 329, 113 N. E. 334, 157 N. Y. S. 1151, 166 App. Div. 937.

Presumption that notice was given as required, arises on appeal in the absence of anything to the contrary. *Katsch v. New Haven*, 86 Conn. 326, 85 Atl. 523.

Notice of issuance of tax bill; description of property is sufficient if it can be identified. *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 259 Mo. 153, 168 S. W. 687.

Notice and hearing after the making up of the assessment rolls is sufficient, though no notice was given of the resolution for the improvement. *Millikan v. Crail*, 177 Ind. 426, 98 N. E. 291.

Notice and hearing to the property owner sometime before the assessment becomes final is a constitutional right. "The general rule is that an assessment made without such notice and opportunity for a hearing is a taking of property without due process of law, and an invasion of constitutional rights." *Millikan v. Crail*, 177 Ind. 426, 98 N. E. 291.

⁵⁴ "It is important not to become confused with regard to just what is required in order to constitute, or rather to meet the requirement of due process of law. 'A careful reading of the terse, yet comprehensive statement we have copied from McQuillin makes the matter quite clear.' The essential requirement is that property owners must be given notice

Failure to provide for such notice and hearing renders the law unconstitutional, as it is taking property without due process of law.⁵⁵

Relating to notice the questions usually arising are, Whether notice to landowners of the time and place fixed for the hearing was given as the applicable law required? Whether the notice was issued by the authority and in form and substances as prescribed?⁵⁶

Whether it was given in the mode provided?⁵⁷

Whether the one who raised the issue may do so legally? Whether there has been a waiver of notice?

§ 2075. Sufficiency of notice.⁵⁸

§ 2076. Service of notice—publication.⁵⁹

Actual personal service of notice is not required, since constructive service, as by mail, by posting or by publica-

and an opportunity to be heard and to test the validity and fairness of the assessment." *Branting v. Salt Lake City*, 47 Utah 296, 302, 153 Pac. 995, 998, quoting with approval most of § 2074, vol. 5, ante.

"A valid assessment was impossible without notice and opportunity to be heard to the landowner or their full equivalent in an opportunity to be fully and effectively heard at some stage of the assessment proceedings prior to the final fixing of the assessment." *West Hartford v. Coleman*, 88 Conn. 78, 89 Atl. 1120, following *Manners v. Waterbury*, 86 Conn. 573, 86 Atl. 14; *Londoner v. Denver*, 210 U. S. 373, 385, 28 Sup. Ct. 708, 52 L. ed. 1103.

⁵⁵ Failure to provide notice, etc., renders law unconstitutional, although court may review proceeding on the record. *Bouslog v. Gulfport*, 112 Miss. 184, 72 So. 896.

⁵⁶ Section 2075, post.

⁵⁷ Section 2076, post.

⁵⁸ *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301; *Monroe v. Pearson*, 176 Iowa 283, 157 N. W. 849.

Although notice does not conform to legal requirements, if the parties appear at the hearing, it is not important. *Redding v. Spokane*, 81 Wash. 262, 142 Pac. 664.

As law specifies. *People ex rel. v. Smith*, 216 N. Y. 95, 110 N. E. 174, reversing 152 N. Y. S. 295, 166 App. Div. 406.

⁵⁹ *Langstaff v. Durant*, 111 Miss. 818, 72 So. 681; *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301.

Notice to church bishop as trustee, held insufficient under a law reciting that notice should "be given to all parties * * * upon whom assessments for benefits are made," since the bishop was a mere "passive depository of the legal title," and the real owners

tion, satisfies all constitutional requirements of due process of law.⁶⁰

Constructive service by publication to non-resident owners of the hearing of benefits to be assessed against property to pay for public improvements are uniformly sustained. The validity of such notice is largely determined by the particular facts in each case.⁶¹

were not thus notified. *Carrick Borough v. Canevin*, 243 Pa. 283, 90 Atl. 147.

⁶⁰ *Carstens & Earles v. Seattle*, 84 Wash. 88, 146 Pac. 381, 385, following *Bauman v. Ross*, 167 U. S. 548, 590, 17 Sup. Ct. 966, 42 L. ed. 270, 288.

If the statute was complied with, it did not affect the jurisdiction of the court that the notice was not received or seen by the property owner. *Napieralski v. West Chicago Park Comrs.*, 260 Ill. 628, 103 N. E. 547, 549, approving *People v. Illinois Central R. R. Co.*, 213 Ill. 367, 72 N. E. 1069.

Publication. *Huntsville v. Gudenrath*, 194 Ala. 568, 69 So. 629; *Tilton v. Decker*, 171 Cal. 731, 154 Pac. 860.

What newspaper. *Boas v. Coats*, 114 Ark. 23, 169 S. W. 312.

In newspaper controlled by one of the commissioners who assessed property, held valid. *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301.

"Statutes authorizing substitute service are always strictly construed. A notice as good as, or equivalent to, the one required by the statute will not do. The very notice which the law prescribes must be given." *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 168 S. W. 721, 724.

If insufficient to impart knowl-

edge of assessment to property owner it is void. *Paris v. Bray* (Tex. Civ. App.), 142 S. W. 927.

Publication; proof of. *Moline v. Chicago, B. & Q. R. Co.*, 262 Ill. 52, 104 N. E. 204.

⁶¹ Under a statute providing that notice to land owners "shall be published in four issues of some weekly newspaper published in the county, the last insertion to be before the day set for hearing," a notice is sufficient if the last publication is made before the proceedings are had, and a notice so published is not the taking of property without "due process of law," in violation of either the federal or state constitution as to a non-resident land owner, although he resided so far away from the seat of the court that the notice could not reach him in time to be effective. *State ex rel. v. Blair*, 245 Mo. 680, 688, 691, 151 S. W. 148, distinguishing *Roller v. Holly*, 176 U. S. 398.

When the law requires the notice to be published a named time before the legal proceedings are to occur, the usual rule is that it is sufficient if the last insertion of the notice appears prior to such proceedings. *Fry v. Bidwell*, 74 Ill. 381; *Harper v. Ely*, 56 Ill. 179; *Nishnabota Drainage District v. Campbell*, 154 Mo. 151, 159; *Ger-*

§ 2077. Hearing on proposed assessment.⁶²

"It has always been the general rule in this country, in every system of assessment and taxation, to give the

man Bank v. Stumpf, 73 Mo. 311, 314.

Publication of notice of assessments in drainage district, held not void as to a nonresident owner simply because he was not named therein when from an examination of the county records his name could have been learned, as statute involved did not so require. State ex rel. v. Blair, 245 Mo. 680, 691, 151 S. W. 148.

Nor is such notice void because of a slight variation in the title of the newspaper in which the notice was directed by the court to be published. State ex rel. v. Blair, 245 Mo. 680, 694, 151 S. W. 148.

⁶² Seattle v. McElwein, 75 Wash. 375, 134 Pac. 1089.

Award of arbitrators, made without notice of hearing and hearing in the absence of waiver by the parties claiming to be aggrieved is a nullity. Auburn v. Paul, 113 Me. 207, 93 Atl. 289, 110 Me. 192, 195-197, 85 Atl. 571.

"The right to be heard in a case of this kind is a sacred right, older than our written constitutions, and the preservation of which is simply further and permanently guaranteed by these well-known provisions of our federal and state constitutions. The decisions of all the courts of the land conspire to safeguard this as one of the primary and fundamental rights of freemen." Bouslog v. Gulfport, 112 Miss. 184, 72 So. 896, 898.

"Every property owner is entitled to a hearing before his prop-

erty is charged with a tax or special assessment, but he is not entitled to more than one hearing before a tribunal having jurisdiction to decide upon any objection he may have to the tax or assessment." Napieralski v. West Chicago Park Comrs., 260 Ill. 628, 103 N. E. 547.

"Due process of law does not require that one liable to assessment for benefits should have an opportunity to be heard on the question whether the public good requires the improvement involved, since no property is to be taken, but only a foundation laid for the exercise of a particular right of taxation." Corliss v. Richford, 85 Vt. 85, 81 Atl. 234.

A hearing which is but an incident or step in the determination by the municipal authorities of the advisability of instituting proceedings to acquire title to carry out a proposed improvement, and which was not intended by the law as the formal hearing and notice preliminary and essential to the taking of private property for public purposes under the guise of an assessment and tax, is not the hearing meant in the Constitution, where the same law makes provision for hearing as the proceedings advance. Re Sewer in Kissel Ave., 143 N. Y. S. 467, 81 Misc. Rep. 541.

It is reasonable to require the property owner, in the absence of some sufficient excuse, to appear personally at the hearing for ex-

person to be assessed an opportunity to be heard at some stage of the proceeding. That 'due process of law' requires this has been uniformly recognized."⁶³

§ 2078. Time for making assessment.⁶⁴

amination. *Re Lawrence Street*, New York City, 136 N. Y. S. 845.

"Regular session," "regular meeting," "next regular term" of county court, to consider assessment of benefits in drainage district under particular statute, construed. *State ex rel. v. Blair*, 245 Mo. 680, 696, 151 S. W. 148.

Where a charter gives the property owner affected by the proposed assessment the right to make objections to the apportionment in writing to the council within a named time after publication of notice of such apportionment and requires any such objections to be heard and determined by the council pursuant to the notice prior to the passage of any ordinance assessing the cost of the improvement against the property benefited, a hearing or an opportunity to be heard is absolutely essential. *Irelan v. Portland* (Ore. 1919), 179 Pac. 286, 289.

⁶³ *Re Sewer in Kissel Ave.*, 143 N. Y. S. 467, 81 Misc. Rep. 541.

Whether there was due process of law depends upon whether the owners of property affected by the assessment had an opportunity, after due notice, to be heard before the assessors. The law gives this right to a hearing, and the only question here is as to whether due notice to the property owners whose lands were to be affected is given by a published notice that

is not directed to anyone, does not describe any property, except that taken for park purposes, and in no other way indicates upon what property or district the assessment may be spread. That notice was not personally served is immaterial. Constructive service by publication was sufficient: *Re Riverside Park*, 119 Minn. 334, 138 N. W. 426.

⁶⁴ *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301; *Cherry v. Bowman*, 106 Ark. 39, 152 S. W. 133; *Hayne v. San Francisco*, 174 Cal. 185, 162 Pac. 625; *Hester v. Collector of Brockton*, 217 Mass. 422, 105 N. E. 631.

The law disclosed no limitation of time within which the assessment must be made; held, whether such limitation be made, and its extent, if made, are wholly matters for legislative action, and the legislature having failed to fix a limit, the court is without power to impose one. *Auburn v. Paul*, 113 Me. 207, 93 Atl. 289.

Assessment to be made before ordering the work. *Burnham v. Milwaukee*, 155 Wis. 90, 143 N. W. 1067, 1069.

Allowed prior to acquisition of title to street by city. *Gill v. Cahill* (Md. 1919), 105 Atl. 747.

When limitation begins to run. *Jewett v. Medford* (Mass. 1919), 123 N. E. 347.

§ 2079. Same—with reference to completion of improvement.⁶⁵

§ 2080. Levy of assessment.⁶⁶

§ 2081. Mode of assessment.

The applicable law usually prescribes the mode of assessment, which, of course, must be followed substantially,⁶⁷ but if no mode is specified, it may be defined by

⁶⁵ Goodholm & Sparrow Inv. Co. v. Cleveland-Trinidad Paving Co. (Okla.), 150 Pac. 109.

Assessment prior to completion of work, held without jurisdiction. Pierce v. Huntsville, 185 Ala. 490, 64 So. 301.

Any time after the completion of the improvement. Phipps v. Medford, 81 Ore. 119, 156 Pac. 787.

Prior to completion and acceptance of improvement. Goodholm & Sparrow Inv. Co. v. Cleveland-Trinidad Paving Co. (Okla.), 150 Pac. 109.

Held, under particular law, that the levy for a sidewalk could not be made after the walk had been built. People ex rel. v. Gray, 256 Ill. 479, 100 N. E. 171.

Sidewalk must be completed before the entire cost thereof can be apportioned to the lots according to their frontage. People v. Lawson, 285 Ill. 382, 120 N. E. 814.

Statute may authorize for improvements completed within six years prior to passage. Campbell v. Haven, 211 Mass. 121, 97 N. E. 611, following Warren v. Street Comrs., 187 Mass. 290, 72 N. E. 1022.

⁶⁶ California. Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 Pac. 296.

Illinois. Lincoln v. Chicago &

A. R. Co., 262 Ill. 11, 104 N. E. 277.

New York. People ex rel. v. Hart, 132 N. Y. S. 827, 75 Misc. Rep. 137.

Oklahoma. Flanagan v. Tulsa, 55 Okla. 638, 155 Pac. 542.

S. Dakota. Wood v. Hurley, 29 S. D. 269, 136 N. W. 107.

Washington. Triangle Traders v. Bremerton, 89 Wash. 214, 154 Pac. 193; Re Shilshole Ave., 94 Wash. 583, 162 Pac. 1010.

Description of property. Georgia Ry. & El. Co. v. Atlanta, 144 Ga. 722, 87 S. E. 1058; Cicero v. Chicago, B. & Q. R. Co., 270 Ill. 606, 110 N. E. 811.

⁶⁷ California. Raisch v. Regents of University (Cal. App.), 174 Pac. 943.

Iowa. Monroe v. Pearson, 176 Iowa 283, 157 N. W. 849; Northern Light Lodge v. Monona, 180 Iowa 62, 161 N. W. 78.

Montana. Mansur v. Polson, 45 Mont. 585, 125 Pac. 1002.

New York. Re Pugsley Ave., New York City, 218 N. Y. 234, 112 N. E. 918, reversing 155 N. Y. S. 605, 169 App. Div. 564.

New Jersey. Bradley v. Asbury Park, 87 N. J. L. 293, 93 Atl. 712.

Oregon. Hochfeld v. Portland, 72 Ore. 190, 142 Pac. 824.

United States. Abbot v. Mil-

the municipality, generally by ordinance, consistent with the law, authorizing the imposition of the burden on property benefited by the improvement.⁶⁸

§ 2082. Same—land in bulk or separate lots or parcels.⁶⁹

Usually each lot, piece or parcel of land should be as-

waukee, 236 Fed. 671, 150 C. C. A. 3.

City may decide under some laws which of two methods it will adopt, but the method adopted must be followed. *Tapp v. Johnson*, 174 Ky. 532, 192 S. W. 504.

Blocks by block rule. *Re Spuyten Duyvil Road*, New York City, 150 N. Y. S. 405.

Each parcel of land should be assessed proportionately to the benefits received without regard to the block by block rule. *Re Blondell Ave.*, New York City, 150 N. Y. S. 403.

“Ordinarily where lands for a new street are to be acquired, it has been deemed entirely equitable to assess the lands in each block the entire amount awarded for land acquired in that block, thus requiring the lands in each block to bear the cost of acquiring land for the street in that block * * * But it has been recognized that it would not be equitable to apply that rule in all cases, and the courts have often disapproved a rule of assessment by the block to block system, or according to frontage, where the application thereof manifestly would not be equitable or just. * * * Manifestly the block to block rule would be equitable and just where the blocks are substantially of the same width, and new corner lots

are created, and interior land is given a new frontage, and in other cases doubtless it would be just and equitable to apply the block to block rule in part.” *Re St. Raymond Ave.*, New York City, 162 N. Y. S. 185, 188, 189, 175 App. Div. 518.

⁶⁸ City to define mode by general ordinance, consistent with applicable law. *Great Northern Ry. Co. v. Leavenworth*, 81 Wash. 511, 142 Pac. 1155.

⁶⁹ **Lot.** Council may determine what constitutes a lot or part thereof. *Lapp v. Marshfield*, 72 Ore. 573, 144 Pac. 83; *Lapp v. Marshfield*, 72 Ore. 573, 144 Pac. 83, citing § 2082, vol. 5, ante.

Square. *Koop v. Henry Bickel Co.*, 168 Ky. 496, 182 S. W. 617.

Block. *Larson v. Ottawa*, 101 Kan. 422, 166 Pac. 565.

“Lot, piece or parcel.” *Oklahoma Ry. Co. v. Severns Paving Co. (Okla.)*, 170 Pac. 216.

Platted blocks control. *Flanagan v. Tulsa*, 55 Okla. 638, 155 Pac. 542.

A block is a platted portion of a city surrounded by streets. *Cravens v. Putnam*, 101 Kan. 161, 165 Pac. 801.

One tract. Although land is platted into blocks and lots, if streets have not been dedicated, for sewer improvements, it must be assessed as one tract, irrespective

essed separately.⁷⁰ At least, many judicial decisions announce this as the prevailing rule, and laws generally so require.⁷¹

However, land owned by one person which is divided but used as a single piece, it has been held, may be assessed as an entire piece instead of as several lots, where all the property abuts on the street improved⁷² especially where the law does not specify separate assessments on each lot.⁷³

A fortiori two lots used as one tract, owned by one person may be assessed as one.⁷⁴

In the absence of a requirement that assessments shall be levied against each lot separately, it is frequently held that they may be levied in gross upon several lots of the same owner.⁷⁵

of the plat. *Boatmen's Bank v. Semple Place Realty Co.* (Mo. App. 1919), 213 S. W. 900.

⁷⁰ *Smith v. Jefferson*, 75 Ore. 179, 146 Pac. 809.

Lump sum assessed against two vacant lots, although owned by one person, held unauthorized. *Chicago v. Lake Forest University* (Ill. 1920), 127 N. E. 352.

⁷¹ Made on three lots collectively, and not separately on each lot, as law required, held void. *Cameron v. Pixlee* (Mo. App. 1919), 96.

⁷² *Abbot v. Milwaukee*, 236 Fed. 671, 676, 150 C. C. A. 3.

A charter provision that "if the owners of property have disregarded the lines of lots as platted and treated two or more lots or fractions thereof as one lot, then the whole parcel of ground or lots so treated shall be regarded as a lot" for the purpose of benefit assessments, when construed in connection with another charter provision requiring that when a street is improved a line shall be drawn

through the middle of the blocks on either side of such street and tax bills issued against the property within such lines, has been held to mean that such lots of these persons as front on the street to be improved, bounded on that side by a street and on the other by a line drawn midway through the block, which have been fenced or improved as one lot, should be treated as one lot, but the tax bill cannot be levied against the lot that fronts on the parallel street. *State ex rel. v. St. Louis*, 234 Mo. 110, 114-115, 135 S. W. 928.

⁷³ *Werninger v. Stephenson*, 82 W. Va. 367, 95 S. E. 1035; *Hager v. Melton*, 66 W. Va. 62, 73, 66 S. E. 13.

⁷⁴ *Mound City v. Melvin* (Mo. App.), 205 S. W. 254.

⁷⁵ *Anderson v. Ocala*, 67 Fla. 204, 64 So. 779.

"Benefits cannot properly be assessed in gross on several tracts.
* * * Where several lots, how-

On the other hand, it has been held that an assessment levied against several lots although owned by one person en masse, instead of being apportioned against them severally, is void.⁷⁶

A single assessment against one lot owned by two persons in common does not violate the rule that each tract or lot must be assessed separately.⁷⁷

Where two streets bounding on a corner lot are improved, such lot may be assessed for each improvement.⁷⁸

§ 2083. Same—division of improvements into parts.⁷⁹

§ 2084. Same—two or more improvements in one assessment.⁸⁰

§ 2086. Same—personal assessment against landowners.⁸¹

ever, are owned and improved as one parcel, and where the roll shows such an assessment, in the absence of evidence to the contrary, it will be presumed that the property was properly treated as one parcel." *Des Plaines v. Winkelman*, 270 Ill. 149, 110 N. E. 417, 420; *Ottis v. Sullivan*, 219 Ill. 365, 76 N. E. 487.

Strip of land fronting on the improvement owned by one person, not platted, with cottages and division fences thereon may be treated as one lot. *Fischer v. Covington*, 155 Ky. 290, 159 S. W. 941.

Tax bills for district sewer may be issued against entire grounds of cemetery association, and not against the separate lots therein. *Mullins v. Mt. St. Mary's Cemetery Ass'n*, 259 Mo. 142, 168 S. W. 685.

⁷⁶ *Clark v. Martin*, 182 Iowa 811, 816, 166 N. W. 276.

⁷⁷ *Cushman v. Warren-Scharf As-*

phalt Paving Co., 220 Fed. 857, 863, 135 C. C. A. 289.

⁷⁸ "We are of the opinion that it was competent for the council to say that this entire parcel was benefited by both improvements, and to assess it for each, provided it did not impose a greater burden than the statute permits, and it follows that the lot may be in two assessing districts." *Williams v. Johnsons' Estate*, 177 Mich. 500, 143 N. W. 627, 630.

⁷⁹ "Corporate authorities." *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244.

⁸⁰ *McQueen v. Van Duesen*, 189 Mo. App. 492, 176 S. W. 1057; *Whitaker v. Dumont Borough*, 90 N. J. L. 383, 101 Atl. 561.

⁸¹ Not authorized. *East St. Louis v. Vogel*, 276 Ill. 490, 114 N. E. 941, 946; *Guaranteed. State Bank v. D'Yarmett (Okla.)*, 169 Pac. 639; *Ridder v. Lewis*, 139 La. 903, 72 So. 447.

§ 2087. Apportionment of assessments.⁸²

"There is a manifest distinction between an apportionment by the legislature and an assessment made by municipal authorities."⁸³

While municipal authorities usually have a wide discretion in the apportionment of assessments, it is nevertheless true that the method prescribed by law must be strictly followed.⁸⁴

The legislature "did not have the power to impose a personal liability on the abutting property owner." *Morgan v. Figg*, 162 Ky. 5, 171 S. W. 416.

A charter provision making an assessment a personal liability, even if unconstitutional, would only vitiate the charter to that extent and no further. *Parker v. Hoqd River*, 81 Or. 707, 160 Pac. 1158.

"Nor was it beyond legislative authority to make the assessments personal debts against the owners of the properties assessed." *Werninger v. Stephenson*, 82 W. Va. 367, 95 S. E. 1035, 1039, following *St. Mary's v. Locke*, 73 W. Va. 30, 80 S. E. 841.

See § 2086, vol. 5, ante.

⁸² Arkansas. *Moore v. Paving Improvement District*, 122 Ark. 326, 183 S. W. 766.

Illinois. *Chicago v. Hirschl*, 275 Ill. 60, 113 N. E. 899; *Ladd v. Chicago, O. & P. Ry. Co.*, 283 Ill. 260, 119 N. E. 276.

Kentucky. *Wickliffe v. Greenville*, 170 Ky. 528, 186 S. W. 476.

Mississippi. *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

New York. *People ex rel. v. Davis*, 165 N. Y. S. 47, 100 Misc. Rep. 334; *Re Grandview Ave.*, 165

N. Y. S. 238; *Overton v. New York*, 223 N. Y. 199, 119 N. E. 408.

Oklahoma. *Spitzer v. El Reno*, 41 Okl. 430, 138 Pac. 797.

Washington. *Moore v. Spokane*, 88 Wash. 203, 152 Pac. 999.

Cannot levy assessment on property in one district to pay for paving in another district. *Celaya v. Brownsville (Tex. Civ. App.)*, 203 S. W. 153, 159.

Street opening. *Re Second and Third Streets*, 163 N. Y. S. 521, 98 Misc. Rep. 716; *Re Fifty-fourth and Fifty-fifth Sts.*, 162 N. Y. S. 754, 98 Misc. Rep. 156.

Widening street. *Chicago v. Chicago Rys. Co.*, 282 Ill. 383, 118 N. E. 728.

Improper apportionment, held an irregularity, subject to correction on appeal. *McGinn v. Van Ness (Cal. App. 1919)*, 181 Pac. 70.

⁸³ *Leser v. Wagner*, 120 Md. 671, 87 Atl. 1040, 1043; *Bassett v. Ocean City*, 118 Md. 121, 84 Atl. 262, 264.

⁸⁴ Arkansas. *Hamilton v. Board of Improvement*, 123 Ark. 327, 185 S. W. 440.

Arizona. *Farmer v. Dahl*, 19 Ariz. 395, 171 Pac. 130.

Georgia. *Kaplan v. Macon*, 144 Ga. 97, 86 S. E. 219.

Kentucky. *Miller v. L. R. Figg Co.*, 175 Ky. 495, 194 S. W. 566.

The law demands that the assessments shall be distributed with substantial equality as near as may be over all property of like kind and similarly situated with reference to the subject-matter of the assessment.⁸⁵

As tersely expressed in a Michigan case, "Provisions of law which make it legally impossible for the assessing officer to apportion the burden of such improvements according to benefits and with approximate equality are said to be arbitrary exactions and not a legitimate exercise of legislative authority."⁸⁶

§ 2088. Same—according to benefits.⁸⁷

Judicial decisions are replete with the emphatic declaration in various forms that the test in all special as-

Kansas. *Cravens v. Putnam*, 101 Kan. 161, 165 Pac. 801.

Louisiana. *Crowley v. Police Jury*, 138 La. 488, 70 So. 487.

Missouri. *Rolla v. Schuman*, 189 Mo. App. 252, 175 S. W. 241.

Massachusetts. *Re De Las Casas*, 227 Mass. 183, 116 N. E. 222.

New York. *Govers v. New Rochelle*, 159 N. Y. S. 221, 95 Misc. Rep. 352.

North Carolina. *Morris v. Hendersonville*, 168 N. C. 400, 84 S. E. 260.

Washington. *Triangle Traders v. Bremerton*, 89 Wash. 214, 154 Pac. 193.

⁸⁵ *Re Eighth Ave., Northwest*, 77 Wash. 570, 138 Pac. 10, 13; § 2021, ante.

⁸⁶ *Cote v. Highland Park*, 173 Mich. 201, 139 N. W. 69.

See § 2021, ante; § 2021, vol. 5, ante.

⁸⁷ *Idaho. McQueen v. Moscow*, 28 Idaho 146, 152 Pac. 799.

Illinois. *Lincoln v. Chicago & A. R. Co.*, 262 Ill. 11, 104 N. E. 277.

Iowa. *Madison County v. Winterset*, 164 Iowa 223, 145 N. W. 492.

Louisiana. *Shreveport v. Shreveport Traction Co.*, 134 La. 568, 64 So. 414.

Washington. *Re Shilshole Ave.*, 94 Wash. 583, 162 Pac. 1010; *East Hoquiam*, 90 Wash. 210, 155 Pac. 754; *Seattle v. Puget Sound Traction, etc., Co.*, 91 Wash. 567, 158 Pac. 252.

United States. *Abbot v. Milwaukee*, 236 Fed. 671, 150 C. C. A. 3.

Ignoring depth of property is not justified. *Benshoof v. Iowa Falls*, 175 Iowa 30, 156 N. W. 898.

Reasonableness for sewer construction on unplatted land used for truck gardening. *Whitsett v. Carthage*, 270 Mo. 269, 193 S. W. 21.

When "land" and "property" are used interchangeably in the applicable law improvements which are a part of the realty are included when determining special

assessment proceedings is that the assessment should not exceed the special benefit to the property.⁸⁸

"All property benefited must be brought within the range of the assessment."⁸⁹

Future benefits. "It is well known and generally

benefits. *Tuscaloosa v. Hill*, 94 Ala. 559, 69 So. 598.

Assessment by the block by block method. *Re Spuyten Duyvil Road*, New York City, 150 N. Y. S. 405, 87 Misc. Rep. 635.

Opening street. *Philadelphia v. Conway*, 257 Pa. 172, 101 Atl. 472.

Opening street; block to block rule usually applied, but where inequitable it should not be. *Re St. Raymond Ave.*, New York City, 162 N. Y. S. 185, 175 App. Div. 518.

Railroad property. *New York Bay R. Co. v. Newark*, 82 N. J. L. 591, 83 Atl. 962, reversing 80 N. J. L. 146, 76 Atl. 327.

Where the construction of a sidewalk benefits property it may be assessed, though it may not front on the sidewalk. *Glencoe v. Uthe*, 253 Ill. 518, 97 N. E. 1057.

Intersections. Law allows improvement to include the cost of intersections in the general account and distribute it over the abutting property in connection with and as a part of the total cost, according to the benefits conferred. The claim that it cannot exceed the width of the line of paving of which the intersections are a part, because otherwise the property owners are compelled to pay for a part of the improvement on intersecting streets was denied. *Re Apple*, 161 Iowa 314, 142 N. W. 1021.

⁸⁸ *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946.

Must be according to benefits. *Re Eighth Ave., Northwest*, 77 Wash. 570, 138 Pac. 10.

Each parcel to be assessed proportionally to the benefit received. *Re Blondell Ave.*, New York City, 150 N. Y. S. 403.

Excess of benefits. *Re Fifth Ave.*, 80 Wash. 464, 141 Pac. 1035.

Void if in excess of benefits. *Chicago v. Kehilath Anshe Mayriv*, 284 Ill. 210, 119 N. E. 905.

Assessment cannot be greater than the special benefit received. *Hester v. Collector of Brockton*, 217 Mass. 422, 105 N. E. 631.

"A special assessment is only justified by special benefits to the property assessed, and the law is that property cannot be specially assessed where it will not be benefited by the improvement unless some other work for which no provision has been made shall be done in the future." *River Forest v. Cummings*, 261 Ill. 228, 103 N. E. 971, holding that in opening a street where a building stood on one of the lots thus precluding the use of the street, in the absence of provision for its removal, adjacent property could not be assessed therefor, following *Waukegan v. Burnett*, 234 Ill. 460, 84 N. E. 1061, and *Chicago v. Kemp*, 240 Ill. 56, 88 N. E. 284, a like case.

⁸⁹ *Bradley v. Asbury Park*, 87 N. J. L. 293, 93 Atl. 712.

recognized that the assessment of future benefits is largely a matter of estimate, and to some extent speculative, depending chiefly upon the opinions of men of sound judgment to determine what the future benefits will probably be; and it is recognized that it is impossible to find an exact standard for the measurement thereof in advance of the improvement constructed, and the law does not require of the assessor the unattainable.”⁹⁰

§ 2089. Same—by front foot.⁹¹

It is well settled that laws authorizing assessments by the frontage method, or what is commonly known as the

⁹⁰ Moore v. Paving Improvement District, 122 Ark. 326, 183 S. W. 766, 768; St. Louis & S. F. R. Co. v. Ft. Smith & Van Buren Bridge District, 113 Ark. 493, 168 S. W. 1066.

⁹¹ Florida. Anderson v. Ocala, 67 Fla. 204, 64 So. 775.

Kentucky. Vogt v. Oakdale, 166 Ky. 810, 179 S. W. 1037.

Missouri. Frazier v. Rockport, 199 Mo. App. 80, 202 S. W. 266; Rockliffe-Gibson Const. Co. v. Zeilda Forsee Inv. Co., 179 Mo. App. 229, 166 S. W. 849.

Massachusetts. Driscoll v. Northbridge, 210 Mass. 151, 96 N. E. 59.

Michigan. Cote v. Highland Park, 173 Mich. 201, 139 N. W. 69.

Minnesota. State v. Ely, 129 Minn. 40, 151 N. W. 545.

New York. People ex rel. v. Hart, 132 N. Y. S. 827, 75 Misc. Rep. 137.

Oregon. Smith v. Jefferson, 75 Or. 179, 146 Pac. 809.

Oklahoma. Block v. Patrick, 35 Okl. 408, 130 Pac. 588.

Tennessee. Memphis v. Hill. (Tenn. 1919), 208 S. W. 613, 615-617.

West Virginia. Avis v. Allen (W. Va. 1919), 99 S. E. 188.

For excavation and grading, apportionment to the various lots along the improvement per front foot authorized. Wills v. Burbank, 182 Mo. App. 68, 167 S. W. 608.

Street paving. Schuylkill Haven Borough v. Trinity Church, 62 Pa. Super. Ct. 413.

Sidewalks. Anderson v. Ocala, 67 Fla. 204, 64 So. 779; People v. Lawson, 285 Ill. 382, 120 N. E. 814.

Front foot method for construction of sidewalks, held valid. Mound City v. Melvin (Mo. App.), 205 S. W. 254.

For sidewalk construction, the assessment may be made on abutting property according to frontage where it is not shown that the municipal authorities failed to ascertain or determine the amount of benefits or that they proceeded upon an erroneous principle. State v. Burnes, 124 Minn. 471, 145 N. W. 377.

Under certain statutes “a proper method of ascertaining the amount to be charged against the individual property owner, when

front foot rule, are constitutionally valid. They do not constitute the taking of private property without due process of law.⁹²

But under a law requiring the assessments to be made according to special benefits, an assessment arbitrarily made on the frontage by the square foot measure is invalid. It "is fatal to the legality of the assessment to make a distribution of the cost on a mathematical basis of square yardage in front of each lot, without regard to its size, shape, depth, location, peculiar conditions, and other circumstances."⁹³

While under such law a special assessment made on a frontage basis merely, without regard to benefits, would

the special improvement is the construction or repair of sidewalks, is to assess the property with the whole cost of the improvement immediately in front of it and for its entire frontage." *Langstaff v. Durant*, 111 Miss. 818, 72 So. 236.

Under a law requiring assessment to be in proportion to frontage, apportioning cost of improvement in proportion to the square foot of sidewalk in front of each lot void. *City Securities Co. v. Harvey*, 176 Cal. 682, 169 Pac. 380.

⁹² Illinois. *Staunton v. Bond*, 281 Ill. 568, 118 N. E. 47.

Missouri. *McGhee v. Walsh*, 249 Mo. 266, 283, 155 S. W. 445.

New Mexico. *Roswell v. Bateman*, 20 N. Mex. 77, 146 Pac. 950.

North Carolina. *Tarboro v. Staton*, 156 N. C. 504, 72 S. E. 577.

Oregon. *Colby v. Medford*, 85 Or. 485, 167 Pac. 487.

It is not true that the only constitutional method is to assess strictly in accordance with benefits ascertained to have been conferred. Rule applied to assessments for the cost of a sidewalk improvement. Whatever be the

theory on which the validity of such sidewalk assessment is sustained, the rule affirming the validity of such an assessment per front foot is firmly established in this court. *Hedden v. Verona Borough*, 82 N. J. L. 736, 82 Atl. 880.

Assessment of the cost of a sewer upon abutting property according to the frontage of each parcel is not a taking of private property without due process of law and contrary to the 14th amendment of the federal constitution. The fact that the abutting property is not benefited is not ground upon which to base objection. *Lyon v. Hyattsville*, 125 Mo. 306, 93 Atl. 919.

"The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness or go beyond the reasonable probability." *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 240 U. S. 55, 58, 36 Sup. Ct. 2540.

⁹³ *Bradley v. Asbury Park*, 87 N. J. L. 293, 93 Atl. 712.

be invalid, the law does not preclude the municipal authorities taking into consideration foot frontage of the various lots as an element in fixing the amount of the assessment.⁹⁴

If the pavement is of uniform width, the assessment by the front foot is presumptively equitable, as each owner is required to pay the same for the same amount of paving in front of each foot of his property. Where, however, streets and sidewalks improved vary in width, and properties assessed therefor by the front foot rule also vary in width, a rigid adherence to this method of apportionment is certain in many instances to result in inequalities.⁹⁵

Notwithstanding assessments on the frontage basis have been sustained for the improvement of street of varying width.⁹⁶

⁹⁴ *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946, citing *Nokomis v. Zepp*, 246 Ill. 159, 92 N. E. 809.

⁹⁵ The question arises does the uniform front foot rule authorized by statute contemplate or permit its application in one assessment district to a plan of improvement with varying widths of the improvement, as a sidewalk, in different parts of the district? "While the cost of preparing the highway for paving may vary along different parts of the way, the rule contemplates that exact equality cannot be reached in tax cases, and approximate justice is attained when each owner pays for the same kind of finished improvement in front of his property in proportion to frontage." "We think the uniform foot front rule contemplates a uniform system of improvement within the assessment district. If the municipal authorities decide it expedient to build pavements of materially dif-

ferent width or quality in different localities they could and should provide different assessment rules, in different assessment districts therefor. We think this course is contemplated and authorized by the statute." *Corby v. Detroit*, 180 Mich. 208, 146 N. W. 670.

⁹⁶ Inequalities will not invalidate. *Wendt v. Tucker* (Ky. 1919), 216 S. W. 61.

Under some laws cost may be apportioned to the abutting property according to the front foot without regard to the fact that the paving is forty feet wide in the business blocks and only thirty feet wide in the residence blocks. The law does not require the paving to be uniform in width. *Trimble v. Stewart*, 168 Mo. App. 276, 281, 153 S. W. 1086.

"If the grading or paving of two streets may be united in one proceeding it is because the property on each of the streets is bene-

As applied to a corner lot an assessment "by the foot front of the property bounding and abutting upon the improvement," it is held, should be for the full frontage of the lot abutting or bounding on the improvement, whether lengthwise or breadthwise.⁹⁷

§ 2090. Same—superficial area.

Laws providing for assessments by area rather than directly according to the peculiar benefits derived by the abutting property are held constitutional.⁹⁸

fited by the improvement of the others. The work as a whole is a benefit to all of the property to be assessed. The extent of the benefit is not measured by the width of the street, but under the statute, by the frontage. Property fronting on a narrow street may be benefited by an improvement of the several streets as much as property fronting on a wider street. These are matters to be considered by the council in fixing the extent of the improvement, and its discretion is not to be overthrown except upon a showing of fraud or abuse of discretion. The mere fact that the streets are of varying widths, which is all that appears here, is not enough to invalidate the proceedings." *Remillard v. Blake & Bulger Co.*, 169 Cal. 277, 146 Pac. 634.

⁹⁷ The plain meaning of the term "front" as employed in the statute, is the real and actual frontage, both lengthwise and breadthwise. The holding was made disregarding any distinction as to the technical meaning of the terms "front or frontage." *Youngstown v. Fishel*, 89 Ohio St. 247, 104 N. E. 141, 143.

Corner lot. Law provided that where there is a corner lot the assessment can only be made against the frontage of the lot, and where there is an improvement on the side of the property there can only be an assessment against it when it is in excess of one hundred feet in addition to the assessment made for such improvement along the street on which the property fronts. Held, an assessment for less than one hundred feet against a lot adjoining a corner lot could be made, notwithstanding both lots are owned by the same individual. *Beale v. Takoma Park*, 130 Md. 297, 100 Atl. 379.

Intersections. *Hipple v. Bates County*, 223 Fed. 22, 138 C. C. A. 436.

⁹⁸ *Grier v. Kramer* (Okl.), 162 Pac. 490, following *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. ed. 879; *McGhee v. Walsh*, 249 Mo. 266, 283, 155 S. W. 445; *Re Rosedale Ave.*, New York City, 162 N. Y. S. 877, 175 App. Div. 864; *Re Ave. V*, Borough of Brooklyn, 144 N. Y. S. 680; *Robertson Lumber Co. v. Grand Forks*, 27 N. D. 556, 147 N. W. 249.

In street improvements laws provide that one-fourth of the whole cost of the improvement shall be assessed on property fronting on the improvement in proportion to the frontage, and the balance of three-fourths on property in the assessment district to be drawn as particularly stated in the municipal charter, or law applicable.⁹⁹

In original construction of streets laws seek to equalize as nearly as may be the burden of the assessment, and where the property is laid off in regular squares there is little difficulty in so adjusting the assessment that the burden may be borne with approximate equality by all of the property owners. But when a street is bounded on one side by a regular square and on the other side by a parcel of land in the shape of a triangle formed by the location of two streets there is, of course, more difficulty in adjusting fairly the assessment. In such case the rule of equality should be observed as near as may be, as bisecting the triangle so as to subject to the improvement of the one street one-half of it, leaving subject to the improvement of the other street the other half. It is apparent that if the whole cost of such triangle should be assessed for the improvement of one street, it should likewise be assessed for the improvement of the other, and the result would be that all the property in the triangle between these two streets would be burdened with a double assessment.¹

§ 2091. Same—each lot for the improvement in front of it.²

Widening street. Re 225th St., New York City, 134 N. Y. S. 926, 150 App. Div. 223.

Cost of sewer system valid. Rogers v. Salem, 61 Or. 321, 122 Pac. 308.

⁹⁹ Loth v. St. Louis, 257 Mo. 399, 165 S. W. 1023; Schneider Granite Co. v. Gast Realty & Inv. Co., 269 Mo. 561, 191 S. W. 689; Granite Bituminous Pav. Co. v. Fleming, 251 Mo. 210, 220, 158 S. W. 4.

¹ Jochum v. Henry Bickel Co., 146 Ky. 73, 141 S. W. 1190.

² Glencoe v. Uthe, 253 Ill. 518, 97 N. E. 1057; Carpenter v. Hamburg, 179 Iowa 1168, 162 N. W. 602.

The statute prescribed that the abutting owner shall pay "the entire cost * * * of the paving work on the basis of the respective frontage of the property on the sidewalk or curbing to be paved or improved." The ordinance pro-

§ 2092. Same—omission of property.³

The general rule is that fraudulent omission of property clearly liable, invalidates the assessment. But as the municipal authorities have a broad discretion in determining what property is benefited, and hence, liable to assessment, the accidental omission to assess property liable cannot be urged against the validity of the assessment by one whose assessment is not increased by reason of the omission.⁴

Mere omission of property in a sewer district, where there was no showing that such property was specially benefited under a law limiting assessments to property so benefited, it was held did not invalidate the assessment.⁵

§ 2093. Same—deduction of damages.⁶

vided for the construction of sidewalks differing in width, on certain portions of a number of streets. "Under such a scheme, each designated portion must be considered as a paving unit. The work of construction necessitates in some places grading, filling, excavations, retaining walls, etc., in addition to the laying of sidewalks. The town of Minden seems to have charged the defendant with the entire cost of the work done in front of his lots. The entire cost of the work done on each street should have been apportioned among the abutting owners according to the respective frontage of their lots." *Minden v. Glass*, 132 La. 927, 61 So. 874.

³ Park not subject to special assessment in benefit district. *Perkinson v. Weber*, 251 Mo. 186, 157 S. W. 961.

Omitted property may be included on reassessment. *Triangle*

Traders v. Bremerton, 89 Wash. 214, 154 Pac. 193.

⁴ *Robertson Lumber Co. v. Grand Forks*, 27 N. D. 556, 147 N. W. 249, holding omission of certain lots within the sewer district whether fatal depends on the circumstances.

⁵ *Aumiller v. North Yakima*, 73 Wash. 96, 131 Pac. 470.

⁶ *Maryland Trust Co. v. Baltimore*, 125 Md. 40, 93 Atl. 454; *Spokane v. Onstine*, 86 Wash. 4, 149 Pac. 1; *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970; *Knickerbocker Co. v. Seattle*, 69 Wash. 336, 124 Pac. 920.

Where property adjoins the improvement it becomes the subject of assessment, and the rule is that in estimating both damages and benefits the criterion is the difference in market value as a whole before and after the changed conditions. *Philadelphia v. Conway*, 257 Pa. 172, 101 Atl. 472, 474.

§ 2094. Limitation of amount of assessment.⁷

Constitutions usually contain no formal restrictions as to the amount of the assessment. Express limitations are common in statutes and municipal charters, as that the burden shall not exceed twenty,⁸ or twenty-five,⁹ or fifty percent of the value of the land or property assessed,¹⁰ or one-half of the value thereof,¹¹ or (sometimes) a certain percentage of the whole cost of the improvement less the cost of intersections.¹²

The limitation may be fixed by resolution or ordinance of the local legislative body.¹³

The assessments cannot exceed the limit named,¹⁴ nor, as pointed out elsewhere in this work, can they exceed the special benefits conferred upon the property charged by the local improvement.¹⁵

The value is usually estimated at the time the levy is made.¹⁶

⁷ *Abbot v. Milwaukee*, 236 Fed. 671, 150 C. C. A. 3; *Sayles v. Pittsfield Board of Public Works*, 222 Mass. 93, 109 N. E. 823.

Offer by property owners to waive the statutory limitation not accepted by the municipality does not estop such persons from claiming the legal limit. *Barley v. Des Moines*, 158 Iowa 747, 138 N. W. 853.

⁸ *White v. Loughborough*, 125 Ark. 57, 188 S. W. 10.

⁹ *Durst v. Des Moines*, 164 Iowa 82, 145 N. W. 528; *Hansen v. Missouri Valley*, 178 Iowa 859, 60 N. W. 340; *Chicago Great Western Ry. Co. v. Council Bluffs*, 176 Iowa 247, 157 N. W. 947; *Grand Haven Basket Factory v. Grand Haven*, 174 Mich. 279, 140 N. W. 609.

¹⁰ *Bayes v. Paintsville*, 166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027; *Vogt v. Oakdale*, 166 Ky. 810, 179 S. W. 1037; *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac.

121; *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965; *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970; *Beach v. Bellingham*, 80 Wash. 287, 141 Pac. 703.

¹¹ *Re West 168th Street*, New York City, 148 N. Y. S. 299, 86 Misc. Rep. 266.

¹² *Wolf v. Cincinnati*, 1 Ohio App. 439, 34 Ohio Cir. Ct. R. 247.

¹³ Resolution. *Re Rosedale Ave.*, New York City, 162 N. Y. S. 877, 175 App. Div. 864.

Ordinance. *Gainesville v. McCreary*, 66 Fla. 507, 63 So. 914.

¹⁴ *Haskett v. Sulphur Springs*, 185 Ind. 315, 114 N. E. 33.

Assessment in excess of limit, of course, is void. *Charlotte v. Brown*, 165 N. C. 435, 81 S. E. 611.

¹⁵ Sections 2018, 2043, 2044, ante; *Carpenter v. Hamburg*, 179 Iowa 1168, 162 N. W. 602.

¹⁶ *Hansen v. Missouri Valley*, 178 Iowa 859, 160 N. W. 340.

The unit for determining the limit, it has been held, is the entire assessment district or area, and not the particular lots or tracts composing the districts.¹⁷

That is, the improvement is viewed as an entirety, as are likewise the costs thereof—accordingly, it has been held that the assessment is not limited to the actual cost of the improvement in front of the particular lot.¹⁸

Moreover, the limitation is applicable to each distinct improvement, without reference to other burdens which the property may have been compelled to bear for the construction of other improvements.¹⁹

Thus where a corner lot abuts on two streets which are separately improved, the limit applies to each improvement, as they can not be considered one improvement.²⁰

Assessments or special tax bills exceeding the estimated costs of the improvement are not necessarily invalid.²¹

In fixing the value the officer may take into consideration the increase of value at the date of his report and make his assessment accordingly. *Re West 168th St.*, New York City, 148 N. Y. S. 299, 86 Misc. Rep. 266, affirmed in 154 N. Y. S. 1118.

¹⁷ "The unit for determining the 50% limit is the entire assessment district, and not the particular lots or tracts composing the district. These may still be assessed to the limit of their proportional benefits, provided the aggregate shall not exceed 50% of the assessed valuation of the whole district. * * * The factor fixing the limit beyond which the total assessments shall not go is 50% of the assessed value of all the property in the district. Obviously this factor changed when the district was changed. There is in the statute neither provision nor

implication that the enlargement of the unit, the district, shall not enlarge the limit of the assessment. The necessary implication is just the contrary." *Eggerth v. Spokane*, 91 Wash. 221, 157 Pac. 859.

¹⁸ *Carpenter v. Hamburg*, 179 Iowa 1168, 162 N. W. 602.

Limit of 20% does not apply to each separate piece of property affected. *White v. Loughborough*, 125 Ark. 57, 188 S. W. 10.

¹⁹ Thus up to limit for street, and up to limit for sewer. *Covington v. Sullivan*, 172 Ky. 534, 189 S. W. 709.

²⁰ *Durst v. Des Moines*, 164 Iowa 82, 145 N. W. 528, 532, distinguishing *Bailey v. Des Moines*, 158 Iowa 747, 138 N. W. 853.

Contra. Charlotte v. Brown, 165 N. C. 435, 81 S. E. 611.

²¹ Tax bills exceeding estimated

If the law does not restrict the cost of the improvement to the estimate thereof, nor declare that the assessments or tax bills shall be void in event of inaccuracy of the estimate, the fact that the cost exceeds the estimate will not invalidate the proceeding. In such case the estimate is advisory merely.²²

§ 2095. Same—costs and expenses included.²³

cost are not invalid. *Kelley v. Morton*, 179 Mo. App. 296.

Estimate of costs, see §§ 1866, 1910, ante.

In excess of estimated costs, held not void as it did not exceed benefits. *Vincent v. South Bend*, 83 Wash. 314, 145 Pac. 452.

Excess of estimated cost more than ninety per cent, held unreasonable. *Parker v. Hood River*, 81 Or. 707, 160 Pac. 1153.

²² "Unless the statute is violated it would be unjust to deprive the contractor of the rewards of his work after he has honestly and faithfully performed his contract, merely because the advice given the city's engineer was not accurate." *Kelly v. Morton*, 179 Mo. App. 296, 299, 166 S. W. 840.

"The contractor had nothing to do with the estimate; and to say he must go unpaid because of a mistake of the commissioners in a matter over which he had no control is manifestly unjust. The law contemplates no such result." *Sheridan v. Fleming*, 93 Mo. 321, 325, 55 S. W. 813.

²³ **Costs and expenses** against property. *Hayne v. San Francisco*, 174 Cal. 185, 162 Pac. 625.

Condemnation. *Spokane v. Kraft*, 82 Wash. 238, 144 Pac. 286.

Work of moving lamp posts and

hydrants in widening a pavement may be included as items of cost. *People ex rel. v. Buffalo*, 137 N. Y. S. 464, 77 Misc. Rep. 532.

Cost of making, levying and collecting the assessment. Laws provide city may in the ordinance for the assessment provide that a certain sum, not to exceed 6% of the amount of the assessment, shall be applied toward the payment of the costs of making and collecting the same. *Park Ridge v. Wisner*, 253 Ill. 434, 97 N. E. 841.

If the ordinance does not contain the provision that the amount shall not exceed 6% it is illegal as to the excess only. *River Forest v. Cummings*, 261 Ill. 228, 103 N. E. 971.

Maintenance charge against defective material or work for a period of years may be included, as the evidence shows from experience may be required, to keep the pavement in good condition during the period covered. *Newberry v. Detroit*, 184 Mich. 188, 150 N. W. 838.

Interest on amended tax bill is to be reckoned as of the original. *Boonville ex rel. v. Stephens*, 238 Mo. 339, 141 S. W. 1111.

Interest allowed if not paid within named time after made. *Goodholm & Sparrow Inv. Co. v.*

§ 2096. Same—what may not be included.²⁴

§ 2097. Confirmation, correction, revision and setting aside of assessment.²⁵

The final act of confirmation of the assessment, the officers, board, tribunal, or court authorized to act therein, and the manner thereof,²⁶ the questions that may be considered, and the method thereof,²⁷ the authority to

Cleveland-Trinidad Paving Co. (Okla.), 150 Pac. 109.

Interest on street improvement assessment may be remitted and when the city does so, it is estopped from claiming on during the period covered by the remission. Corby v. Detroit, 191 Mich. 308, 158 N. W. 160.

Interest on tax bills may be allowed, and in addition, in event of legal proceedings to collect the same, a reasonable attorney's fee may be added. Nitsche v. State Security Bank (Okla.), 170 Pac. 234.

²⁴ Grading, held could not be included as a part of sidewalk construction. Kindley v. Rogers, 85 Kan. 645, 118 Pac. 1037.

Interest on warrants allowed after they become delinquent provided by law, held not chargeable against property owners. Giles v. Roseburg, 82 Or. 67, 160 Pac. 543.

Changes in a street opening proceeding after it was started—changes in the elimination or modification of grade—should be borne by the city and not imposed upon the property owners. Re Second & Third Streets, 163 N. Y. S. 521, 527, 98 Misc. Rep. 716.

Estimated profits, where the city maintained an asphalt plant and paved the street cannot be included in the amount of the assessment.

Newberry v. Detroit, 184 Mich. 188, 150 N. W. 838.

Extras and incidentals. In the absence of charter provision or provision in the ordinance authorizing the improvement, extras or incidentals cannot be charged against the property benefited, including making the abstract of property owners, clerical work in making the assessment and work of superintendence of an engineer. Giles v. Roseburg, 82 Or. 67, 160 Pac. 543.

²⁵ Re Second & Third Streets, 163 N. Y. S. 521, 98 Misc. Rep. 716.

Acceptance of the work and the approval of the assessment is a quasi judicial act, conclusive against the property owner, unless fraudulent. Alsmeyer v. Adams (Ind. App.), 105 N. E. 1033.

²⁶ Chicago v. Marsh, 251 Ill. 298, 96 N. E. 250; Chicago v. Farwell, 284 Ill. 491, 120 N. E. 520.

Confirmation by city council which hears and passes upon objections. Ellison v. Lamoure, 30 N. D. 43, 151 N. W. 988.

Confirmation of the assessment roll must be had by ordinance. Seattle v. Jones, 95 Wash. 5, 163 Pac. 12.

Confirmation by court. Re Seattle, 66 Wash. 327, 119 Pac. 852.

²⁷ Confirmation; question con-

revise,²⁸ or set aside,²⁹ and order a new assessment,³⁰ the notice of confirmation, if any is required,³¹ the conclusiveness of the act of confirmation,³² and the right to appeal,³³ are controlled by local laws.

sidered, *Re Grandview Av., City of New York*, 165 N. Y. S. 238.

Hearing of objections to assessment. *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301; *Charlotte v. Brown*, 165 N. C. 435, 81 S. E. 611.

Hearing of objections for sewer construction. *Chicago v. Sullivan Machinery Co.*, 269 Ill. 58, 109 N. E. 696.

²⁸ Municipal councils often have power to revise the assessment, but their power in this respect is generally limited. *Montclair v. Brewster*, 88 N. J. L. 432, 97 Atl. 255.

Reduction of assessment. *Hansen v. Missouri Valley*, 178 Iowa 859, 160 N. W. 340.

²⁹ Inadequacy of awards in proceeding to secure land for public playgrounds, as ground for setting aside. *Re Public Playground, New York City*, 157 N. Y. S. 991, 93 Misc. Rep. 289.

³⁰ On proceeding to confirm, council may set aside and order a new assessment. *Reiff v. Portland*, 71 Or. 421, 141 Pac. 167; *Allen v. Bellingham*, 77 Wash. 469, 137 Pac. 1016.

³¹ Certificate of publication of notice as to confirmation of the assessment must comply with the law. *Haugan v. Chicago*, 259 Ill. 249, 102 N. E. 185.

³² Confirmation is not conclusive if the assessments contravene the basic principles of the statute upon which its legality necessarily depends. *Corby v. Detroit*, 180 Mich. 208, 146 N. W. 670.

³³ *Seattle v. Puget Sound Traction, L. & P. Co.*, 91 Wash. 567, 158 Pac. 252.

Appeal from judgment of confirmation allowed. *Mt. Carmel v. Risley*, 263 Ill. 299, 104 N. E. 1035; *Niles Center v. Schmitz*, 261 Ill. 467, 104 N. E. 143; *Des Plaines v. Winkelman*, 270 Ill. 149, 110 N. E. 417; *Highwood v. Chicago & N. W. Ry. Co.*, 276 Ill. 98, 114 N. E. 585; *Re Riverside Park*, 119 Minn. 334, 138 N. W. 426.

Appeal from county court confirming assessment allowed. *Haugan v. Chicago*, 259 Ill. 249, 102 N. E. 185; *Roseville v. Smith*, 256 Ill. 302, 100 N. E. 292.

Appeal from judgment of county court abating the whole of the tax as to some lots and part of the tax as to other lots in the improvement district. *People ex rel. v. Carnahan*, 270 Ill. 489, 110 N. E. 837.

Appeal from judgment of trial court confirming the action of the city council which confirmed the assessment, allowed. *Dement v. Caldwell*, 22 Idaho 62, 125 Pac. 200.

Appeal to council, which may hear and affirm or reverse the assessment: *People ex rel. v. Smith*, 152 N. Y. S. 295, 166 App. Div. 406.

Law allowed appeal from an order of confirmation, but provided that unless prosecuted within six months, unless the court should extend the time, it should be regarded as abandoned, held man-

§ 2098. Same—nature of proceedings—notice.³⁴

The proceeding is not in personam but in rem. Notice (in Illinois) is required to be given, not to the owner of the property, but to the person who paid the general taxes for the preceding year, and such notice gives the court jurisdiction to proceed against the property.³⁵

§ 2099. Same—by court—petition or application.³⁶

§ 2100. Same—jurisdiction of court.³⁷

Laws authorize the court to modify, alter, change, annul or confirm any assessment, and issue all orders necessary to make a true and just assessment of the costs of the improvement according to the principles of the applicable law, and from time to time continue the application for that purpose as to the whole or any part of the premises. The court may exclude land included in the assessment, but cannot include land not embraced therein, since this could be done on notice only as in case of an original assessment.³⁸

datory. *Re Gruger Ave.*, New York City, 143 N. Y. S. 811, 158 App. Div. 912.

Law making assessments of benefits for street improvements conclusive without allowing an appeal, held constitutional. *Dallas v. Atkins* (Tex. Civ. App.), 197 S. W. 593.

³⁴ *Chicago v. Marsh*, 251 Ill. 298, 96 N. E. 250; *People ex rel. v. Sargent*, 252 Ill. 104, 96 N. E. 847; *Chicago v. Stein*, 252 Ill. 409, 96 N. E. 886.

Substantial compliance with law as to notice is sufficient. *Price v. Lincoln* (Neb. 1919), 171 N. W. 921.

³⁵ *Kankakee v. Illinois Central R. Co.*, 258 Ill. 368, 101 N. E. 592.

³⁶ *Decatur v. Barteau*, 260 Ill. 612, 103 N. E. 601; *Peoria v. Peoria*

Ry. Co., 274 Ill. 48, 113 N. E. 170; *Belleville v. Mitchell*, 273 Ill. 136, 112 N. E. 368.

Objection that there was no public hearing cannot be raised where the appropriate board recommended the improvement since such recommendation established the fact, prima facie, that all such preliminary requirements have been complied with. *Homewood v. Grannis*, 265 Ill. 135, 106 N. E. 442.

³⁷ *Kankakee v. Illinois Central R. Co.*, 263 Ill. 589, 105 N. E. 731; *Chicago v. Wells*, 274 Ill. 360, 113 N. E. 695; *Highland Park v. Gail*, 276 Ill. 24, 114 N. E. 563; *Indianapolis v. Hawkins*, 180 Ind. 382, 103 N. E. 10.

³⁸ *Kankakee v. Illinois Central R. Co.*, 258 Ill. 368, 101 N. E. 592.

§ 2101. Same—evidence.³⁹§ 2102. Same—judgment.⁴⁰

Determination of benefits and apportionment of expenses, held a legislative function which the court would not review. *Re Baldwin Street*, 154 N. Y. S. 728, 169 App. Div. 128.

Courts will not interfere as by changing the benefit district after confirmation except in case of fraud, arbitrary action or proceeding on a fundamentally erroneous basis. *Viegle v. Spokane*, 78 Wash. 359, 139 Pac. 33.

Selection of the material being discretionary with the municipal authorities, without a showing of fraud, bad faith or oppressive action, their motive in having the work done of a particular material or in a particular manner will not be reviewed by the court, especially if the work is completed without proper objection from the property owners affected. *Realty Savings Co. v. Southern Asphaltolene Road Co.*, 180 Ky. 242, 202 S. W. 679.

Proceedings to confirm; finding that property was benefited will not be disturbed unless fraud, mistake or abuse of discretion is shown, or that the assessment was made on a fundamentally wrong basis. *Trimble v. Seattle*, 93 Wash. 472, 161 Pac. 381.

³⁹ *Illinois. Winnetka v. Taylor*, 288 Ill. 624, 124 N. E. 348; *Rock Island v. Marshal*, 263 Ill. 133, 104 N. E. 1008; *Kankakee v. Illinois Central R. Co.*, 258 Ill. 368, 101 N. E. 592; *Chicago v. Edens*, 264 Ill. 64, 105 N. E. 730.

Iowa. Hansen v. Missouri Val-

ley, 178 Iowa 859, 160 N. W. 340; *Jones v. Sheldon*, 172 Iowa 406, 154 N. W. 592.

Maryland. Consolidated Gas, etc., Co. v. Baltimore, 130 Md. 20, 99 Atl. 968.

New York. People ex rel. v. Smith, 152 N. Y. S. 295, 166 App. Div. 406; *Re Crescent Street, New York City*, 217 N. Y. 294, 111 N. E. 1069, affirming 155 N. Y. S. 1100, 170 App. Div. 946.

Washington. Re Fifth Ave., West, 80 Wash. 464, 141 Pac. 1035; *Trimble v. Seattle*, 93 Wash. 472, 161 Pac. 381; *Horton Inv. Co. v. Seattle*, 94 Wash. 556, 162 Pac. 989; *Hoquiam v. Moe*, 97 Wash. 99, 165 Pac. 1055; *Spokane v. Miles*, 72 Wash. 571, 131 Pac. 206.

On second appeal. *Cahill v. Baltimore*, 129 Md. 17, 98 Atl. 235.

⁴⁰ *People ex rel. v. Ward*, 272 Ill. 65, 111 N. E. 557; *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543; *Bradley v. New York Central R. Co.*, 277 Ill. 608, 115 N. E. 640.

Iowa. Chicago Great Western Ry. Co. v. Council Bluffs, 176 Iowa 247, 157 N. W. 947.

Minnesota. Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525.

Massachusetts. Driscoll v. North Bridge, 210 Mass. 151, 96 N. E. 59.

New York. Re Tibbett Ave., New York City, 221 N. Y. S. 127, 116 N. E. 779, affirming 161 N. Y. S. 1147, 175 App. Div. 975.

Washington. Re Empire Way, Seattle, 100 Wash. 636, 171 Pac. 1010.

§ 2103. Same—conclusiveness of judgment.⁴¹

§ 2104. Assessment record.⁴²

§ 2105. Sufficiency of certificate, warrant or taxbill.

Municipal improvements of the several kinds are paid according to the variant provisions of the applicable local law by bonds,⁴³ certificates,⁴⁴ warrants,⁴⁵ or special tax-

⁴¹ Arizona. *Globe v. Willis*, 16 Ariz. 378, 146 Pac. 544.

Alabama. *Brock v. Decatur*, 185 Ala. 146, 64 So. 73; *Ex parte Gudenrath*, 194 Ala. 568, 69 So. 629.

California. *Cake v. Los Angeles*, 164 Cal. 705, 130 Pac. 723.

Illinois. *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946; *Kankakee v. Illinois Central R. Co.*, 257 Ill. 298, 100 N. E. 996; *Chicago v. Weber*, 260 Ill. 105, 102 N. E. 1001; *Benton v. Blake*, 259 Ill. 68, 102 N. E. 170; *Oak Park v. Eldred*, 265 Ill. 605, 107 N. E. 145.

Iowa. *Atkinson v. Webster City*, 177 Iowa 659, 158 N. W. 473.

Washington. *Vancouver v. Corporation of Catholic Bishop*, 90 Wash. 319, 156 Pac. 383; *Re Boyer Ave.*, 79 Wash. 664, 141 Pac. 58; *Viegle v. Spokane*, 78 Wash. 359, 139 Pac. 33; *Great Northern Ry. Co. v. Seattle*, 73 Wash. 576, 132 Pac. 234; *Seattle v. Gratton*, 76 Wash. 401, 136 Pac. 488; *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754; *Metropolitan Building Co. v. Seattle*, 92 Wash. 660, 159 Pac. 793; *Re Empire Way*, 100 Wash. 636, 171 Pac. 1010; *Sanderson v. Seattle*, 95 Wash. 582, 164 Pac. 217.

Operation and effect of confirmation in collateral attack. *People*

v. Culver, 281 Ill. 401, 117 N. E. 1044.

A confirmation is not binding on a property owner who has not received notice of the proceedings to assess benefits for street improvements as required by law, and consequently he may make defense. *Carriek Borough v. Canevin*, 243 Pa. 283, 90 Atl. 147.

⁴² *Chicago v. Hill*, 251 Ill. 502, 96 N. E. 223; *Endress v. Plainfield*, 88 N. J. L. 72, 95 Atl. 754; *Loomis v. Chicago & N. W. Ry. Co.*, 31 S. D. 408, 141 N. W. 386; *Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 192 Mich. 65, 158 N. W. 164.

Filing of special tax list for the cost of a sidewalk is required. *People v. Moore*, 265 Ill. 444, 107 N. E. 121.

In construction of a sidewalk a special tax list must be prepared by the municipal officers, to validate the assessment. *People ex rel. v. Moore*, 261 Ill. 549, 104 N. E. 179.

⁴³ Street improvement bonds. *Schaffer v. Smith*, 169 Cal. 764, 147 Pac. 976; *Kohn v. Federal Construction Co.*, 171 Cal. 547, 153 Pac. 916.

Street improvement bonds payable to contractor. *Nashville Exchange Bank v. Smith* (Ind. App.), 114 N. E. 881.

⁴⁴ Sufficiency of. *Wood v. Hur-*

bills.⁴⁶ In each instance, of course, the applicable local law is controlling.

The issuance of these various evidences of indebtedness must be at the time,⁴⁷ in the manner and form,⁴⁸ and

ley, 29 S. D. 269, 136 N. W. 107, 111; *Electric Park Co. v. San Antonio Base Ball Ass'n* (Tex Civ. App.), 155 S. W. 1189.

Certificate in statutory form is sufficient. *Sault Ste Marie v. Minneapolis, St. Louis & S. S. M. Ry. Co.*, 192 Mich. 65, 158 N. W. 164. Certificate of cost of improvement, the filing of, held a condition precedent to the delinquency of a special assessment. The court passes on its sufficiency. The finding of the court is designed to be a condition precedent to the liability of the property owner. *People ex rel. v. Conway*, 253 Ill. 140, 97 N. E. 251.

The bill of costs of a sidewalk which shows in separate items the cost of excavation, cost of materials and the cost of laying down and supervision of the work shows in separate items the cost of construction and supervision thereof, as required. *People v. Moore*, 265 Ill. 444, 107 N. E. 121.

Certificates prima facie evidence, etc. *Dillon v. Whitley* (Tex. Civ. App. 1919), 210 S. W. 329.

⁴⁵ Warrants partake of negotiability, they do not nevertheless in law have the same protection as negotiable instruments. *Stimson v. Godbe*, 48 Utah 444, 160 Pac. 280.

Warrant directing the collection of an assessment forthwith in one payment where the assessment was required to be paid in annual installments under the law, while

illegal and defective upon its face, does not render the assessment void so that it may be set aside. *Orange County Traction Co. v. Newburg*, 149 N. Y. S. 1, 86 Misc. Rep. 512.

⁴⁶ *Bambrick Bros. Contruction Co. v. Semple Place Realty Co.*, 270 Mo. 450, 193 S. W. 543; *State ex rel. v. Chillicothe*, 237 Mo. 486, 141 S. W. 602; *Boonville ex rel. v. Stephens*, 238 Mo. 339, 141 S. W. 111, reversing 95 S. W. 314; *Mullins v. Mt. St. Mary's Cemetery Ass'n*, 259 Mo. 142, 168 S. W. 685; *Barber Asphalt Paving Co. v. Kansas City Hydraulic P. B. Co.*, 170 Mo. App. 503, 156 S. W. 749; *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995; *Mound City v. Melvin* (Mo. App. 1918), 205 S. W. 254; *McCormick v. Clopton*, 150 Mo. App. 129, 137, 130 S. W. 122.

Tax bill included more land than assessed owner had, held not void when precise tax was readily ascertainable. *Washington ex rel. v. Stumpe* (Mo. App. 1917), 197 S. W. 165.

Validity. *Granite B. Pav. Co. v. McManus*, 244 Mo. 184, 148 S. W. 21.

Tax bills for sewer; construction of "lot" in particular charter. *State ex rel. v. Reynolds* (Mo. 1920), 218 S. W. 337.

Tax bill not legally authorized, void. *Webster Groves v. Reber* (Mo. App. 1919), 212 S. W. 38.

⁴⁷ Certificate issued before completion of work, held a mere irreg-

by the authority, designated.⁴⁹ Substantial compliance in these respects is always essential.

Minor irregularities in their issuance will be disregarded, informalities may be corrected, and when necessary, amendments may be made.⁵⁰

Their validity and force necessarily depend exclusively upon substantial observance of all mandatory and jurisdictional provisions of the controlling law, in initiating the proceeding, conducting it through its several steps, and in the performance of the work, and the completion of the improvements in good faith and in substantial compliance with the provisions of the contract and the law.⁵¹

ularity. *Parkes v. Milwaukee*, 148 Wis. 84, 134 N. W. 152.

Special tax bills, time of issuance. *Koch v. Shepherd* (Mo. App.), 193 S. W. 601.

Special tax bills issued on incomplete street improvement work are void. *Wills v. Burbank*, 182 Mo. App. 68, 167 S. W. 608.

⁴⁸ How tax bills are issued. *California v. Kiesling* (Mo. App.), 180 S. W. 559.

Tax bill held not void for failure to state the place of payment, the provision of the law so requiring was viewed as directory. *Bambrick Bros. Constr. Co. v. McCormick*, 157 Mo. App. 198, 137 S. W. 43.

⁴⁹ Tax bills to be valid should be issued in accordance with the controlling law. *Bambrick Bros. Construction Co. v. Semple Place Realty Co.*, 270 Mo. 450, 193 S. W. 543.

Ordinance may give authority to city clerk to sign, as signing is a ministerial act. *First National Bk. v. Shewalter*, 153 Mo. App. 635, 134 S. W. 42.

⁵⁰ Change in personnel of city government will not destroy power

to issue correct or amended tax bills. *Likes v. Rolla*, 190 Mo. App. 140, 147, 176 S. W. 520.

Amended tax bills may be issued as substitutes for incorrect bills after the municipal corporation issuing them has been absorbed by another municipal corporation, the latter to issue the amended bills. *Barber Asphalt Pav. Co. v. Field*, 134 Mo. App. 663, 111 S. W. 907; *Barber Asphalt Pav. Co. v. Hayward*, 248 Mo. 280, 286-289, 154 S. W. 140.

Informalities may be corrected by the officer who issued the tax bill, although not in office at the time. *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 556, 172 S. W. 436.

⁵¹ Proceedings to collect tax bills for public work are in invitum and any substantial departure from the requirements of the law renders such tax bills void. *Schulte v. Currey*, 173 Mo. App. 578, 158 S. W. 888, 892.

If in the formation of the assessment districts all of the material parts of the charter are complied with the special assessments are valid and collectible. *Ruecking*

Under named conditions interest is usually allowed on tax bills and such evidences of indebtedness,⁵² however this matter is dependent solely upon the local laws.

VI. THE LIEN.

§ 2106. The lien—must be created by law—construction of law.

Special assessments are generally secured by a lien on

Construction Co. v. Withnell, 269 Mo. 546, 191 S. W. 685.

Tax bills make out a prima facie case of the regularity of the proceedings and hence the burden is on defendant to show that there was some defect, as there were no plans and specifications on file or that such plans and specifications were insufficient in some particular. Reinert Bros. Constr. Co. v. Whitmer (Mo. App.), 206 S. W. 387.

Work authorized to be done being repair work and the work necessary to be done and which was in fact done being repair work, the property owner will not be made to pay for reconstruction work and hence tax bills issued as for reconstruction work are void. Parker-Washington Co. v. Meriwether, 172 Mo. App. 344, 158 S. W. 74.

Special tax bills regular upon their face make out a prima facie case, subject to rebuttal, but the burden is on defendant to show the defects in the proceedings or work rendering the tax bills void. Bayless v. Webb, 252 Mo. 20, 158 S. W. 597; Delmar Investment Co. v. Lewis, 271 Mo. 317, 196 S. W. 1137; Maryville v. Cox, 181 Mo. App. 254, 167 S. W. 1166.

⁵² Interest on special tax bills. Koch v. Shepherd (Mo. App.), 193 S. W. 601; Eyermann v. Stevens, 185 Mo. App. 168, 170 S. W. 330.

Interest on warrants allowed. Stinson v. Godbe, 48 Utah 444, 160 Pac. 280.

Paving warrants drawing interest. Stinson & Co. v. Godbe (Utah 1918), 170 Pac. 782.

Warrant holder entitled to interest from date of assessment to date of payment. Oklahoma County Comrs. v. Seymour, 45 Okla. 533, 146 Pac. 219.

Sewer bonds bearing a higher rate of interest than the law permits held not illegal. Pratt v. Davis, 97 Kan. 598, 15 Pac. 936.

Interest on installments denied after long delay. Norman v. Allen (Okla.), 147 Pac. 1002.

Benefit assessments bear interest. Goodholm & Sparrow Inv. Co. v. Cleveland-Trinidad Paving Co. (Okla.), 150 Pac. 109.

Interest on special tax bill, allowed if not paid within the time provided by law at rate named to date of judgment and on the legal rate is allowed. Stover v. Springfield, 167 Mo. App. 328, 152 S. W. 122.

the property benefited by the improvement by virtue of statute.⁵³

In the absence of a statute on the subject the lien may exist under authority of the municipal charter. The lien must be measured as to its commencement, duration, limitation and priority by the law of its origin. Such lien cannot arise by implication from the power to tax, but it must be expressly created by law, and when so created it cannot be enlarged by construction, and the law under which it exist must be strictly construed. A law creating such lien will not be held to be retroactive unless it clearly appears to have been the legislative intent.⁵⁴

The municipality as such has no lien for special assessments levied upon property within its corporate limits. Taxes are not a lien unless expressly made so by statute; and special assessments stand on the same footing. Municipal corporations have no power to create liens by ordinance or otherwise unless such power has been expressly conferred upon them.⁵⁵

⁵³ *Morgan v. Figg*, 162 Ky. 5, 171 S. W. 416; *Morey Engineering & Const. Co. v. St. Louis Artificial Ice Rink Co.*, 242 Mo. 241, 146 S. W. 1142; *Granite Bituminous Pav. Co. v. Parkview Realty & Imp. Co.*, 199 Mo. App. 226, 201 S. W. 933.

Must be created by law. *Washington Street*, 60 Pa. Super. Ct. 536.

If city condemns land to which lien attaches for a park the lien continues against the money in the hands of the city assessed as damages to the owner. *Municipal Securities Co. v. Kansas City*, 195 Mo. App. 464, 467, 193 S. W. 880.

Where by law a lien exists prior to the making of the record, an error in recording the contract will not affect the lien. *Wentland v.*

Clark & Henery Constr. Co. (Cal. App.), 173 Pac. 480, 482.

Municipality does not waive its lien because it does not immediately issue its warrant for the collection at the expiration of the time in which the tax may be paid. *Klov Dahl v. Springfield*, 81 Ore. 168, 158 Pac. 668.

⁵⁴ *Jaicks v. Oppenheimer*, 264 Mo. 693, 175 S. W. 972.

Lien created by a statute could not arise before the statute was passed. *Campbell v. Haven*, 211 Mass. 121, 97 N. E. 611.

⁵⁵ The Illinois Local Improvement Act provides that the judgment of confirmation shall be a lien upon the property assessed from the date thereof, to the same extent and of equal force and validity as a lien for general taxes, for a

The remedy by lien given by statute may be modified at any time before rights have become vested or when such change does not impair the obligation of a contract or substantially deprive a party of adequate means of enforcing his right.⁵⁶

§ 2107. Same—steps require to perfect.⁵⁷

Before the lien can exist the steps prescribed to be taken must be followed, as filing it within the specified time,⁵⁸ serving notice of intention to file,⁵⁹ filing a copy of the ordinance or resolution declaring the necessity for the improvement with proof of publication thereof, and a certificate that the ordinance or resolution authorizing the improvement was duly enacted,⁶⁰ giving a description of the property, with a statement of the ownership thereof, etc.⁶¹

Slight irregularities or errors in the steps to perfect the lien will be disregarded,⁶² as including property not

period or five years. Such liens are in favor of the people of the state, and not to the various municipalities that may be interested in the taxes. *O'Connell v. Sanford*, 256 Ill. 62, 99 N. E. 885.

In Pennsylvania boroughs have liens. *Alliance Borough v. Schwartz*, 53 Pa. Super. Ct. 448.

City has lien in New Mexico for watering streets. *Roswell v. Bateman*, 20 N. Mex. 77, 146 Pac. 950.

⁵⁶ *Gubbins v. Harrington*, 48 Ind. App. 488, 96 N. E. 31.

⁵⁷ *York v. Miller*, 254 Pa. 436, 98 Atl. 1049.

Lien cannot exist unless law observed. *Bostwick v. South Jacksonville (Fla. 1919)* 82 So. 235.

⁵⁸ *Punxsutawney Borough v. Nordstrom*, 61 Pa. Super. Ct. 253.

Lien to be filed within a specified time after the completion of

the work and failure to do so is fatal to the lien. *Waynesburgh Borough v. Ray*, 59 Pa. Super. Ct. 640.

⁵⁹ *York City v. Miller*, 60 Pa. Super. Ct. 407.

Failure to serve a bill for the sum due on the property owner before filing the lien as required by ordinance, held not vital, as such provision was directory only. *Philadelphia v. Price*, 62 Pa. Super. Ct. 557.

⁶⁰ *Halvorson v. Mullin (Iowa)*, 156 N. W. 289.

⁶¹ *Philadelphia v. Peters*, 57 Pa. Super. Ct. 275, 279; *Tiegel v. Love*, 61 Pa. Super. Ct. 149.

⁶² *Bienfield v. Van Ness*, 176 Cal. 585, 169 Pac. 225.

Wentland v. Clark & Henery Const. Co. (Cal. App.), 173 Pac. 480, 482.

subject to the lien.⁶³ Moreover, amendments are allowed.⁶⁴

§ 2108. Same—when lien attaches.⁶⁵

§ 2109. Same—duration and discharge.⁶⁶

The lien originating by virtue of statute or municipal charter, is controlled entirely as to its duration and dis-

⁶³ Thus the fact that a lien filed against a railroad property may include grounds upon which is laid part of the roadbed and tracks, which are exempt from assessment for municipal improvements does not invalidate it as to railroad property to which it may legally attach. *South Fork Borough v. Pennsylvania R. Co.*, 251 Pa. 261, 96 Atl. 710.

⁶⁴ A lien giving the wrong number of the ordinance under which the improvements were authorized may be amended, showing the true number. *Alliance Borough v. Schwartz*, 53 Pa. Super. Ct. 448.

⁶⁵ *Hardy v. Pittman*, 17 Ga. App. 738, 88 S. E. 405; *Etta Contracting Co. v. Bruning*, 134 La. 48, 63 So. 619.

Time of commencement determined by law creating right to issue the tax bill. *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 172 S. W. 436.

After entry of the assessment in the designated office, and not on confirmation by order of court. *Ryan v. Domestic Realty Co.*, 147 N. Y. S. 974, 85 Misc. Rep. 449.

From the time the certificate is issued to the contractor pursuant to law. *Cady v. Henes*, 151 Wis. 422, 138 N. W. 1022.

On confirmation of the assess-

ments. *Re Essex County Park Com.*, 80 N. J. Eq. 1, 83 Atl. 462.

When made, the assessment constituted a lien upon the land covered by it, and relates back to the time of the passage of the order for the construction of the sewer, and is an encumbrance from that time. "It is one entire lien upon one entire parcel of land, and so remains, notwithstanding subsequent divisions into several parcels owned in severalty by different persons." *Hester v. Thompson*, 217 Mass. 422, 105 N. E. 631.

From date of ordinance levying the assessment. *Hudguis v. Schultice*, 118 Ark. 139, 175 S. W. 526.

⁶⁶ Duration; registry; reinscription. *Barber Asphalt Paving Co. v. King*, 130 La. 788, 58 So. 572.

Failure to carry forward in the tax lists delinquent paving assessments, as required by law, results in a loss of the lien. *Holleran v. Toenningsen*, 178 Iowa 1365, 161 N. W. 25, following *Fitzgerald v. Sioux City*, 125 Iowa 403, 101 N. W. 268.

Assessments payable in installments. *Wallace v. New Castle Realty Co.*, 57 Ind. App. 120, 106 N. E. 615; *Donahue v. La Grange*, 263 Ill. 607, 105 N. E. 762.

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charge by the law of its creation. In all respects not covered by the law creating the lien, either the rules and principles of the common law prevail,⁶⁷ or a general statute on the subject, if any, in the particular jurisdiction,⁶⁸

change Bank v. Smith (Ind. App.), 114 N. E. 881.

Delay in obtaining judgment will not invalidate the lien. Philadelphia v. Peters, 57 Pa. Super. Ct. 275.

Sale of the property extinguishes the lien. Nitsche v. State Security Bank (Okla.), 170 Pac. 234.

The lien is discharged when the tax is paid by the sale. O'Connell v. Sanford, 256 Ill. 62, 99 N. E. 885.

Scire facias to revive; notice or service to owner. Philadelphia v. Peters, 62 Pa. Super. Ct. 90.

Until the assessment is paid. Hudguis v. Schultice, 118 Ark. 139, 175 S. W. 526.

Failure to revive judgment by scire facias within the statutory period, results in the loss of the lien. Scranton v. Genet, 232 Pa. 272, 81 Atl. 335.

⁶⁷ The statute declared that general taxes are a "perpetual" lien from a date specified in the year in which they are levied until paid. The charter involved provided that all local assessments "shall be a paramount lien on real estate on which the same may be imposed from the date of the warrant issued for the collection thereof." The court said: "Generally speaking, a lien of this character as well as other liens upon specific property, cease and terminate upon an appropriation, in due proceedings, of the property to the payment of the debt. And it has often been held, in the absence of a statute

to the contrary that tax liens under the system of foreclosure in force in this state, namely, by judgment of court and sale of the property, become merged in the judgment, and are finally extinguished and discharged upon a valid sale of the property. * * * The lien does not, in the absence of some statute so providing, survive or continue after the foreclosure thereof in the manner provided by law, namely, by extinguishing the right of redemption. Such was the rule as respects state tax liens prior to the insertion of the word 'perpetual' in the tax lien statute by amendment, and whether that amendment has changed the rule we need not stop to consider. The charter involved here contains no such language, and the general rule as to the duration of such liens controls. In the assessment proceedings in question, judgment for the assessment against property was duly rendered, and at the subsequent sale thereunder the city became the purchaser of the property, thereafter terminating the right of redemption by proper notice as provided for by the charter. Within the rule stated this completely extinguished the lien and vested in the city the ownership of the property. The lien was gone and in it and in its place the city was the owner of the property." Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293.

⁶⁸ Where the statute creating the special tax lien does not state the

§ 2110. Same—order of priority.⁶⁹

The rule as to priority of special tax liens, in the absence of statute or charter provision, is the same as that applicable to general taxes which is that the last in point of time is paramount to those of an earlier date.⁷⁰

time the lien shall last a general statute on the subject will control. *Koch v. Shepherd* (Mo. App.), 193 S. W. 601.

⁶⁹ *Gomeringer v. McAbee*, 129 Md. 557, 99 Atl. 787.

⁷⁰ *Woodill & Hulse Electric Co. v. Young* (Cal. 1919), 182 Pac. 422, declining to follow *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *Jaicks v. Oppenheimer* (Mo. App.), 168 S. W. 216, 264 Mo. 693, 175 S. W. 972, overruling *Parker-Washington Co. v. Corcoran*, 150 Mo. App. 188, 129 S. W. 1031; *Redemeier v. Perkinson* (Mo. App.), 186 S. W. 1107.

In a dissenting opinion, in *Jaicks v. Oppenheimer*, *supra*, it was pointed out, that the law involved provided that the lien should attach upon the date of its certification by a named officer or board to another officer or board. When the cost of the work payable in special tax bills or assessments has been determined the same as assessed against the tracts of land, chargeable therewith and the officers or board certify the apportionment and assessment of such cost to the municipal officer named. Until this has been done no levy of tax has been made against the land and no lien can therefore attach. If no lien can attach until the time stated, and the law giving the lien must be strictly construed and can have no retroactive force, the liens under such

law become effective only in the order of the dates of their respective certification. "To hold otherwise would be to declare a lien created before the tax on which it is based has been levied." *Jaicks v. Oppenheimer*, 264 Mo. 693, 175 S. W. 972, 975, dissenting opinion by Walker, J., approving "the well reasoned case" of *Parker-Washington Co. v. Corcoran*, 150 Mo. App. 188, 129 S. W. 1031.

Local assessment liens levied in a specified time, held superior to like liens of earlier years. "It cannot well be said that the law makers intended to declare that assessment lien attached to property in a particular year should remain either paramount or upon an equality with like liens attaching during subsequent years, for such a construction would be at variance with the clause found in the body of the statute that the general rules of law in respect to the priority of tax liens which apply to the local assessment lien. The rule applied to all other liens is that the first in point of time takes priority, while the rule is the reverse in tax liens. 'As to such liens the last shall be first, and the first last.' It is clear that the legislature intended this rule to continue and be applicable to assessment liens and rights accruing thereunder. It follows that, to give effect to the

That the legislature may create a lien for taxes, whether such taxes be general or by local assessment superior to all other liens regardless of priority of time, is settled beyond controversy.⁷¹

A special tax bill though subsequent to a deed of trust, or other encumbrance, in point of time takes priority over the latter.⁷²

VII. VALIDITY AND REMEDIES.

§ 2111. Non-observance of law authorizing improvement.

The validity of special taxation or assessment for local improvements depends exclusively upon substantial adherence to the power granted the municipality, and a similar adherence to the method and procedure prescribed by the legislation authorizing the particular improvement.⁷³

statute, it must be construed as applying, when declaring the equal rank of assessment and general tax liens, to such as arise from taxes or assessments levied during a particular year. So that while the two liens for a particular year are of equal rank, those arising during subsequent years, though as between the two concurrent, are paramount and superior to those attaching during preceding years, and must be paid by the prior lienholder to protect his rights." *Gould v. St. Paul*, 120 Minn. 172, 139 N. W. 293.

⁷¹ *Carstens & Earles v. Seattle*, 84 Wash. 88, 146 Pac. 381, 384. See note to *Seattle v. Hill*, 35 L. R. A. 372.

⁷² *Granite Bituminous Paving Co. v. Parkview Realty & Imp. Co.*, 199 Mo. App. 226, 201 S. W. 933, 938, 168 Mo. App. 468, 151 S. W.

479, following *Morey Engineering & Constr. Co. v. St. Louis Artificial Ice Rink Co.*, 242 Mo. 241, 146 S. W. 1142, 40 L. R. A. (N. S.) 119, Ann. Cas. 1913C, 1200.

Mortgage lien although prior to the improvement is inferior to lien for a local improvement. *Lannan v. Waltenspiel*, 45 Utah 564, 147 Pac. 908.

⁷³ *Municipal Securities Co. v. Moriarity*, 195 Mo. App. 579, 581; *Gratz v. Kirkwood*, 182 Mo. App. 581, 166 S. W. 319; *Meyers v. Wood*, 173 Mo. App. 564, 158 S. W. 909; *Menefee v. Taubman*, 159 Mo. App. 318, 140 S. W. 604; *Rolla v. Schuman*, 189 Mo. App. 252, 175 S. W. 251; *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 172 S. W. 436; *Ramney v. Cape Girardeau*, 185 Mo. App. 229, 170 S. W. 342; *Kelley v. Morton*, 179 Mo. App. 296; 166 S. W. 840; *Mary-*

Non-observance of mere directory provisions, slight irregularities, immaterial variances, and minor departures from the letter of the requirement which are not fundamental to the initiation, and progress of the improvement, or the levying, confirmation and validity of the assessment, and which are not injurious or prejudicial to the landowners who are called upon to pay, will be disregarded.⁷⁴

ville v. Cox, 181 Mo. App. 254, 167 S. W. 1166; Jones v. Barber Asphalt Pav. Co., 174 Mo. App. 393; 160 S. W. 276; Schulte v. Currey, 173 Mo. App. 578, 158 S. W. 888; Youmans v. Everett, 173 Mo. App. 671, 160 S. W. 274; Gilsonite Roofing & Pav. Co. v. Handlan, 150 Mo. App. 239, 129 S. W. 770.

Can only be supported by a valid ordinance and observance substantially of all preliminary requirements which are mandatory. Lovington v. Gregory (Ill. 1919), 122 N. E. 504.

The work was done without a contract as required. Schmidt v. Santa Monica Commercial Club (Cal. App. 1919), 179 Pac. 315.

⁷⁴ California. Burnham v. Abrahamson, 21 Cal. App. 248, 131 Pac. 338, 343; McGinn v. Van Ness (Cal. App. 1919), 181 Pac. 70.

Illinois. Peoria v. Peoria Ry. Co., 274 Ill. 48, 113 N. E. 170; Chicago v. Sullivan Machinery Co., 269 Ill. 58, 109 N. E. 696.

Iowa. Hubbell v. Des Moines, 168 Ia. 418, 150 N. W. 701; Williams v. Cherokee (Ia. 1918), 169 N. W. 110; Elkins v. Harper, 82 W. Va. 377, 95 S. E. 1033.

Kentucky. Bayes v. Paintsville, 166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027; Scott v. Jenkins, 155 Ky. 817, 160 S. W. 487;

Russell v. Whitt, 161 Ky. 187, 170 S. W. 609.

Louisiana. Winfield v. Collins (La.), 78 So. 747.

Massachusetts. Campbell v. Haven, 211 Mass. 121, 97 N. E. 611.

Missouri. Gratz v. Kirkwood (Mo. App.), 183 S. W. 1071; Webb City v. Aylor, 163 Mo. App. 155, 147 S. W. 214; California v. Kiesling (Mo. App.), 180 S. W. 559; Reinert Bros. Const. Co. v. Whitmer (Mo. App.), 206 S. W. 387.

Minnesota. State v. Burnes, 124 Minn. 471, 145 N. W. 377.

New York. Harris v. Churchill, 152 N. Y. S. 73.

Oregon. Dillon v. Beacom, 67 Or. 118, 134 Pac. 778.

Texas. Ft. Worth v. Capps Land Co. (Tex. Civ. App.), 205 S. W. 491.

Utah. Stott v. Salt Lake City, 47 Utah 113, 151 Pac. 988.

Washington. Moore v. Spokane, 88 Wash. 203, 152 Pac. 999; Allen v. Bellingham, 77 Wash. 469, 137 Pac. 1016; Gerlach v. Spokane, 68 Wash. 589, 124 Pac. 121; Spokane v. Ridpath, 74 Wash. 4, 132 Pac. 638.

Resolution called for repairs, but part of the work done was resurfacing, held assessment not void. Noble v. Des Moines (Ia.), 174 N. W. 44.

Among the many non-essential irregularities which the courts generally agree should be put out of view, in adjudicating the merits of special assessment and taxation cases, are: Minor irregularities in the wording of the preliminary resolution or ordinance of intention, or necessity,⁷⁵ or in the enactment of the ordinance or resolution authorizing and providing for the improvement;⁷⁶ errors in stating the dimensions of the proposed improvements in the ordinance which referred to the plans and specifications on file;⁷⁷ irregularity in publication, as where the plant of the publisher was partly beyond the corporate limits,⁷⁸ or where there is a slight variation in the title of the newspaper in which the notice is directed by the court to be published;⁷⁹ immaterial departure from the specifications,⁸⁰ e. g., as to the material to go into a sidewalk, particularly as to mixture;⁸¹ changing the materials,⁸² minor defects, errors and irregularities as to

“The trend of the later decisions of the supreme court and of this court is not to look upon these tax bills with so critical an eye as to overthrow them, when it appears that the work was let according to contract, was provided for by proper ordinance, was let in accordance with law, was performed in a satisfactory manner,” etc. *Meyer v. Bobb*, 185 Mo. App. 685, 707, 171 S. W. 600.

Omission to enter in the records of the legislative body the enactment of the ordinance levying the special assessment, and steps as to a hearing of protests, relating to the apportionment, held not to render void the proceedings, as the requirements were regarded as directory only. *Croslin v. Warner-Quinlan Asphalt Co.* (Okl. 1918), 177 Pac. 376.

⁷⁵ Failed to specify the material to be used in the construction.

Remillard v. Blake & Bilger Co., 169 Cal. 277, 146 Pac. 634.

⁷⁶ *Jones v. Sheldon*, 172 Ia. 406, 154 N. W. 592.

Minor errors in the recital in the ordinance. *Spokane v. Miles*, 72 Wash. 571, 131 Pac. 206.

⁷⁷ *Miner's Bank v. Clark*, 252 Mo. 20, 158 S. W. 597.

⁷⁸ *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

⁷⁹ *State ex rel. v. Blair*, 245 Mo. 680, 691, 694, 151 S. W. 148.

⁸⁰ *Trimble v. Stewart*, 168 Mo. App. 276, 153 S. W. 1086.

⁸¹ *Stott v. Salt Lake City*, 47 Utah 113, 151 Pac. 988.

⁸² *Miner's Bank v. Clark*, 252 Mo. 20, 158 S. W. 597; *Werninger v. Stephenson*, 82 W. Va. 367, 95 S. E. 1035.

Irregular change in contract, made in good faith, as to using more expensive paving material, with knowledge of property own-

plans and specifications,⁸³ and in the estimate of the cost of the improvement;⁸⁴ slight variance between the character of the sewer called for by the resolution of intention and the ordinance for the construction and the specifications;⁸⁵ minor variances between the contract for the improvement and the ordinance providing therefor;⁸⁶ minor irregularities in the mode of doing the work,⁸⁷ or deviations from the requirements of the contract which do not essentially change the character of the work agreed upon,⁸⁸ especially where it has been duly accepted;⁸⁹ failure to establish the grade for a sidewalk;⁹⁰ delay in beginning and completing the work;⁹¹ delay in proceeding with the improvement;⁹² irregularities in the deposit and sale of improvement bonds to pay for the

ers, who do not object, will not invalidate the assessment. *Re Hamilton Ave.*, 48 Pa. Super. Ct. 156.

⁸³ *Bayes v. Paintsville*, 166 Ky. 679, 179 S. W. 623, L. R. A. 1916B, 1027.

Slight inaccuracies in estimating the quantity of work. *Gratz v. Kirkwood* (Mo. App.), 183 S. W. 1071.

Mode of the adoption of plans and specifications. *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809; *Burnham v. Abrahamson*, 21 Cal. App. 248, 131 Pac. 338.

The fact that the estimates, specifications, etc., were made by an acting city engineer, instead of by a city engineer provided by ordinance, will not invalidate tax bills. *Boonville v. Stephens*, 238 Mo. 339, 356.

See § 484, vol. 2.

⁸⁴ *Paxton v. Bonner*, 172 Mo. App. 479, 157 S. W. 986; *Stover v. Springfield*, 167 Mo. App. 328, 152 S. W. 122.

Small errors in the computations of estimate of cost. *Maryville v. Cox*, 181 Mo. App. 254, 167 S. W. 1166.

Absent fraud or mistake, excessive estimate will not invalidate. *Chicago v. Davis*, 253 Ill. 404, 97 N. E. 700.

⁸⁵ *Myers v. Wood*, 173 Mo. App. 564, 158 S. W. 909.

⁸⁶ Where the work done conformed to the ordinance, the contract must yield. *Wills v. Burbank*, 182 Mo. App. 68, 167 S. W. 608.

⁸⁷ *Hendry v. Salem*, 64 Or. 152, 129 Pac. 531.

⁸⁸ *Werninger v. Stephenson*, 82 W. Va. 367, 95 S. E. 1035.

⁸⁹ *Creekmore v. Central Const. Co.*, 157 Ky. 336, 163 S. W. 194.

⁹⁰ *Boas v. Coats*, 140 Ark. 23, 169 S. W. 312.

⁹¹ *California v. Kiesling* (Mo. App.), 180 S. W. 559.

⁹² *Ft. Worth v. Capps Land Co.* (Tex. Civ. App.), 205 S. W. 491.

work;⁹³ minor defects in extension of time for the completion of the improvement by resolution of the legislative body, as failure of certification by subordinate officer;⁹⁴ failure to extend formally the time for the completion of the work where it was completed within four days after the time limit;⁹⁵ minor irregularities in the approval and acceptance of the work;⁹⁶ irregularity in making the assessment before the completion and acceptance of the improvement;⁹⁷ slight irregularities in the method pursued and the apportionment of the assessments which do not injure or prejudice the complaining landowner,⁹⁸ e. g., in the construction of a sewer the mere omission to assess certain property in the sewer district where there is no showing of bad faith, etc., and that such property was specially benefited, under a law restricting assessments to property so benefited;¹ minor irregularities in naming individuals as owners of the land assessed;² irregularity in resolution for reassessment in that it omitted certain recitals;³ erroneous determination of the value of property to be assessed, where limited to a named percentage of its value.⁴ Improvement work done by contract with a non-registered foreign corporation, although forbidden, does not render the assessment invalid.⁵

So failure of the contractor to keep the pavement in good repair as provided in his guaranty has no effect whatever on the validity of the tax bills.⁶

⁹³ *Norris v. Lawton* (Okl.), 148 Pac. 123.

⁹⁴ *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

⁹⁵ *Cormack v. Cormack*, 82 Or. 108, 160 Pac. 380.

⁹⁶ *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809.

⁹⁷ *Goodholm & Sparrow Inv. Co. v. Cleveland-Trinidad Paving Co.* (Okl.), 150 Pac. 109.

⁹⁸ *Moore v. Spokane*, 88 Wash. 203, 152 Pac. 999.

¹ *Aumiller v. North Yakima*, 73 Wash. 96, 131 Pac. 470.

² *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809.

³ *Reiff v. Portland*, 71 Or. 421, 141 Pac. 167.

⁴ *Durst v. Des Moines*, 164 Ia. 82, 145 N. W. 528.

⁵ *Campbell v. Daniell*, 68 Fla. 282, 67 So. 90.

⁶ *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S. W. 276, 282.

Unless the law makes the filing of the preliminary estimate of costs a prerequisite to proceeding, failure to file prior to the enactment of the ordinance for the improvement is not fatal.⁷

Minor irregularities may be subsequently cured by action of the municipal authorities.⁸

Legislative curative acts, in event of irregularities and minor defects, as to form, and changes in municipal organization during the progress of the improvement are common and are quite generally sustained.⁹

On the other hand, irregularities, omissions and discrepancies in the enactment of the resolution or ordinance of intention, or necessity or authorizing and providing for the improvement, the notice to the property owners affected, the letting of the contract for the work, improper location of the improvement, defective materials or workmanship, the mode and apportionment of the assessments, and the issuance of the warrants, certificates or tax bills, resulting from non-observance of mandatory and jurisdictional requirements, designed to safeguard the rights of landowners, will be given careful judicial consideration.¹⁰

§ 2112. Defects and irregularities affecting validity of assessment.

In the making of local improvements that must be paid for in whole or in part by property owners, courts very generally enforce the rule that the procedure prescribed must be strictly observed, in good faith in all material respects.¹¹

⁷ Jones v. Barber Asphalt Paving Co., 174 Mo. App. 393, 160 S. W. 276.

⁸ Rindge Co. v. Los Angeles, 29 Cal. App. 683, 156 Pac. 975.

⁹ Overton v. New York, 223 N. Y. 199, 119 N. E. 408.

¹⁰ Ranney v. Cape Girardeau, 185 Mo. App. 229, 170 S. W. 342;

Springfield v. Baxter, 180 Mo. App. 40, 48, 165 S. W. 366.

¹¹ Langstaff v. Durant (Miss. 1920), 84 So. 459; Moundsville v. Yost, 75 W. Va. 224, 83 S. E. 910; Albers v. St. Louis, 268 Mo. 349, 188 S. W. 83.

“Any material departure from the express authority is fatal to

Usually the non-observance of mandatory provisions is fatal to the validity.¹²

Hence, failure to do the things prescribed which are "fundamental to the levying, the confirmation and the validity of any assessment," will invalidate it.¹³

Judicial decisions have pronounced the requirements following mandatory and jurisdictional:

Resolution or ordinance declaring the necessity for or intention to make the improvement;¹⁴ notice of intention to levy the special assessment;¹⁵ ample notice to property owners affected;¹⁶ public hearing on the proposed improvement when the law so requires;¹⁷ (under some

the special assessment." *Gainsville v. McCreary*, 66 Fla. 507, 63 So. 914, citing § 2023, vol. 5, ante.

"It must affirmatively appear from an inspection of the records of the council in its proceedings for the levying of such assessments that the statutory requirements prescribed as a condition precedent to an exercise thereof have been observed." *Jones v. Salem*, 63 Or. 126, 123 Pac. 1096, 1098.

¹² *Kohn v. Federal Construction Co.*, 171 Cal. 547, 153 Pac. 916.

¹³ *Robertson Lumber Co. v. Grand Fork*, 27 N. D. 556, 147 N. W. 249, 251.

¹⁴ Initial resolution is essential to validity. *Garner v. Anniston*, 178 Ala. 430, 59 So. 654.

Resolution of intention to be enacted and notice of such resolution given. *Kohn v. Missoula*, 50 Mont. 75, 144 Pac. 1087.

Laws of this character are generally construed to be mandatory, the purpose being to inform those whose property is to be affected. The resolution should be so full as to impart definite information concerning the proposed work.

Delmar Inv. Co. v. Lewis, 271 Mo. 317, 324, 196 S. W. 1137, overruling 180 Mo. App. 22, 162 S. W. 675; *Phoenix Brick & Const. Co. v. Gentry Co.*, 257 Mo. 392, 395-399, 166 S. W. 1034, approving *Kirksville v. Coleman*, 103 Mo. App. 215, 77 S. W. 120, and *Gist v. Rackliffe-Gibson Const. Co.*, 224 Mo. 369, 123 S. W. 921.

Agreeably to certain decisions failure to pass and publish a preliminary resolution of necessity, being jurisdiction, is fatal to the validity of the assessment. *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S. W. 276, 279.

¹⁵ *Dillon v. Beacom*, 67 Or. 118, 34 Pac. 778; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

¹⁶ Assessments for sewer, without sufficient notice of the proceedings to establish the sewer district, held void. *Jones v. Salem*, 63 Or. 126, 123 Pac. 1096; *Randall v. Salem*, 62 Or. 509, 123 Pac. 1099.

¹⁷ The steps taken may raise the presumption that such hearing was had as where the recommendation of a board establishes the fact.

laws) a description of the general character of the material to be used in the initial resolution;¹⁸ the enactment of a valid ordinance or resolution authorizing and providing for the improvement;¹⁹ (under some laws) the fixing by resolution, the special assessment per front foot upon the abutting property at an amount not exceeding either the actual cost of the work or the estimated special assessment stated in the ordinance providing for the work;²⁰ sufficient description of the work of grading, as expressly required by law when such work is included in a resolution for a street improvement;²¹ sufficient description of the property which is to bear the burden;²² the preparation and submission of the preliminary estimate of the cost of the improvement, when so required by law;²³ the preparation and filing of plans and specifications.²⁴

prima facie, that such preliminary requirement has been complied with. *Homewood v. Grannis*, 265 Ill. 135, 106 N. E. 442; *Chicago v. Edens*, 261 Ill. 272, 103 N. E. 996; *Glencoe v. Uthe*, 253 Ill. 518, 97 N. E. 1057.

Mere irregularities as to time of hearing by county court to make assessments for benefits in drainage district, will not invalidate tax bills. *State ex rel. v. Blair*, 245 Mo. 680, 691, 694, 151 S. W. 148.

¹⁸ *Garner v. Anniston*, 178 Ala. 430, 59 So. 654, 2 Ala. App. 389, 56 So. 874.

¹⁹ *Moundsville v. Yost*, 75 W. Va. 224, 83 S. E. 910; *Monett v. Fowler*, 184 Mo. App. 615, 170 S. W. 684; *Lovington v. Gregory* (Ill. 1919), 122 N. E. 504.

Ordinance for the improvement was not legally passed, as where it was enacted at a special session of one branch, without the

meeting of the other branch, in which case the ordinance being wholly void cannot be corrected. *Bridge's Son v. Kelly*, 156 Ky. 96, 160 S. W. 771.

²⁰ *Gainsville v. McCreary*, 66 Fla. 507, 63 So. 914.

²¹ *Reinert Bros. Const. Co. v. Whitmer* (Mo. App.), 206 S. W. 387.

²² Failure to describe the property affected. *Chicago v. Farwell*, 260 Ill. 565, 103 N. E. 606. See *Chicago v. Sullivan Machinery Co.*, 269 Ill. 58, 109 N. E. 696.

Description of property assessed, held not vague. *Casey v. Cincinnati H. & D. Ry. Co.*, 263 Ill. 352, 105 N. E. 130.

²³ *Muskogee v. Nicholson* (Okla.), 171 Pac. 1102.

²⁴ *Monett v. Fowler*, 184 Mo. App. 615, 170 S. W. 684; *Mullins v. Everett*, 172 Mo. App. 186, 157 S. W. 823.

The following defects and irregularities have been judicially declared fatal to the validity of the assessment: The initiation of the proceedings by the wrong authority, as by the mayor and superintendent of streets instead of by commissioners, as provided;²⁵ letting the contract for the improvement without authority,²⁶ as without the consent of the named proportion of the electors, when the law so requires,²⁷ or proceeding after a sufficient remonstrance had been presented;²⁸ fatal variance between the ordinance authorizing and providing for the improvement and the preliminary resolution,²⁹ or estimate;³⁰ material deviation of the ordinance authorizing and providing for the improvement and the contract therefor from the preliminary resolution of necessity;³¹ delegation of legislative authority,³² as power to establish the street grade for the construction of a sidewalk,³³ or by conferring power to exact whatever material the street superintendent may decide upon which, of course, will have the effect of increasing or diminishing the cost of the work;³⁴ failure to comply substantially with the specifications;³⁵ failure to complete the improvement within a reasonable time,³⁶ or issuing tax bills therefor

²⁵ *Sullivan v. Mandell*, 212 Mass. 174, 98 N. E. 690.

²⁶ *Thrasher v. Kirksville* (Mo.), 204 S. W. 804.

²⁷ *Sanders v. Gainesville*, 141 Ga. 441, 81 S. E. 215.

²⁸ *Hoover v. Newton*, 195 Mo. App. 579, 193 S. W. 892.

²⁹ *Fellows v. Dorsey*, 171 Mo. App. 289, 157 S. W. 995.

See § 1888, ante; § 1888, vol. 4, ante.

³⁰ *Highland Park v. Gail*, 276 Ill. 24, 114 N. E. 563; *Chicago Heights v. Angus*, 267 Ill. 628, 108 N. E. 758.

³¹ *Jones v. Barber Asphalt Paving Co.*, 174 Mo. App. 393, 160 S. W. 276, 279.

See § 1888, ante.

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³² *Bradley v. New Haven*, 91 Conn. 100, 98 Atl. 977.

³³ *Hardinsburg v. Mercer*, 172 Ky. 661, 189 S. W. 1117.

Ordinance authorizing the construction of a sidewalk failing to fix the grade, either directly or by reference to another ordinance, since the establishment of such grade is a legislative function and cannot be delegated. *People ex rel. v. Meerts*, 267 Ill. 210, 108 N. E. 57.

³⁴ *Miller v. Portland*, 78 Or. 165, 151 Pac. 728.

³⁵ *Buis v. Nestler* (Mo. App.), 203 S. W. 221.

³⁶ *Gilsonite Const. Co. v. Field*, 157 Mo. App. 577, 138 S. W. 676.

prior to its completion;³⁷ fraud suggested in the approval and acceptance of the work, as where the work is obviously defective and fails to comply with the specifications, but is substantially a different work than that agreed to be done;³⁸ fraud in the letting of the contract, as an offer of a secret or special rebate to one or more of the abutting property owners, made by the successful bidder for the purpose of preventing or allaying the opposition of such owners to the proposed improvement and at a time when their opposition might prove sufficiently effective to defeat the bidder and prevent him from obtaining the contract;³⁹ but an offer of a cash discount for the prompt payment of a tax bill made after the letting of the contract and the completion of the work, not in pursuance of any previous understanding, will not vitiate the assessment.⁴⁰

It is sometimes held that a substantial variance from the preliminary estimate will invalidate the assessment,⁴¹ but this circumstance alone will not generally so result.⁴²

Assessments levied for local improvements by the offi-

³⁷ Failure to complete is a substantial non-performance. *Wills v. Burbank*, 182 Mo. App. 68, 167 S. W. 608.

³⁸ *Rudolph S. Blome Co. v. Herd* (Tex. Civ. App.), 185 S. W. 53, 57, stating "We fail to see how the work could have been approved without marked incompetency, inexcusable negligence, or downright fraud on the part of the city authorities."

³⁹ *Rackliffe-Gibson Const. Co. v. Zeilda Forsee Co.*, 170 Mo. App. 93, 156 S. W. 66.

Withdrawing objections to the improvement induced by the contractor paying the property owner, held a fraud. *McKine v. Independence*, 175 Mo. App. 332, 162 S. W. 326.

Contractor's promise of rebate to

prevent opposition to the improvements, invalidates assessments. *Platt v. Parker-Washington Co.*, 161 Mo. App. 663, 144 S. W. 143.

⁴⁰ *Kurtz v. Knapp*, 127 Mo. App. 608, 612, 106 S. W. 537.

⁴¹ *Chicago v. Terwillinger*, 253 Ill. 395, 97 N. E. 694.

Assessment exceeding published estimate of costs, held void. *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

⁴² *Probert v. Garth*, 15 Mo. App. 387, 137 S. W. 320.

By statute, fact that cost of work exceeds estimate will not render tax bills void. *Gratz v. Kirkwood*, 165 Mo. App. 196, 145 S. W. 870.

See § 1888, ante; § 1888, vol. 4, ante.

cers of a municipal government formed under a statute afterwards held unconstitutional were sustained on the *de facto* doctrine.⁴³

The fact that assessments are in part void will not invalidate the entire assessment in toto.⁴⁴

§ 2113. Failure to advertise for bids for work.⁴⁵

§ 2114. Legal existence of street or way improved.⁴⁶

⁴³ The assessments were levied prior to the declaration of the unconstitutionality of the statute. *Wendt v. Berry*, 154 Ky. 586, 157 S. W. 1115, 45 L. R. A. (N. S.) 1101, holding that acts of public officers, whether they be state, county, district or municipal, created by an act of the legislature, are valid as to the public and all persons having dealings with them antecedent to time the legislative act under which they were exercising power was declared unconstitutional.

⁴⁴ *Corby v. Detroit*, 180 Mich. 208, 146 N. W. 670; *Board of Public Improvement v. Southwestern Gas & Electric Co.*, 121 Ark. 105, 180 S. W. 764.

Part valid and part void on railroad property liable and railroad property not liable. *New York Central & H. R. R. Co. v. Buffalo*, 135 N. Y. S. 196, 76 Misc. Rep. 655.

"Any mistake in the apportionment would not invalidate the entire lien, but would simply be a case for the court to correct the assessment." *Russell v. Whitt*, 161 Ky. 187, 170 S. W. 609, 611.

⁴⁵ Fatal to validity of assessment. *Hoosier Const. Co. v. Seibert*, 63 Ind. App. 594, 114 N. E.

981, 984; *Thrasher v. Kirksville* (Mo.), 204 S. W. 804; *Ranney v. Cape Girardeau*, 185 Mo. App. 229, 170 S. W. 342; *Watson v. Salem*, 84 Or. 666, 164 Pac. 567; *Moundsville v. Yost*, 75 W. Va. 224, 83 S. E. 910, 912.

Delegating the advertising of bids to the city engineer and clerk, held fatal. *Helwig v. Gloversville*, 158 N. Y. S. 475.

Any scheme or device designed to promote favoritism will render tax bills void. *Youmans v. Everett*, 173 Mo. App. 671, 160 S. W. 274.

Ordinance fixing a minimum wage per day thus preventing free competition which results in increase of cost does not render the assessment void, since a just deduction may be made therefrom. *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

⁴⁶ Title to street may be acquired after levy of assessment. *Werninger v. Huntington*, 78 W. Va. 107, 88 S. E. 655, 657, citing § 2114, vol. 5, ante.

Plat showing streets, etc., was never signed, acknowledged or filed as law prescribed, tax bills against lots shown on such plat, held valid where the owners knew of such unrecorded plat and recognized the subdivision, etc. *Parker-Washing-*

§ 2115. Improvements extending to private property.⁴⁷

§ 2116. Change of title to avoid assessments.⁴⁸

§ 2117. Presumption in favor of assessment.⁴⁹

In the absence of a showing to the contrary assessments are presumed valid,⁵⁰ and the one who attacks their

ton Co. v. Bradley, 197 Mo. App. 447, 455, 456, 196 S. W. 111.

"Where there is a map or plat though not executed and recorded in conformity to the statute and on which plat is laid off streets and alleys and other public grounds, and the owner sells lots with reference to such plats, his act in making such sales amount to a dedication of such parcels as appear to be designed for streets and other public purposes." Baker v. Vanderburg, 99 Mo. 378, 390, 12 S. W. 462; § 1594, *supra*.

⁴⁷ Albers v. Acme Paving & Crusher Co., 196 Mo. App. 265, 194 S. W. 61.

Tax bills for public improvements against private property are void where the city owns neither the fee nor the easement, and the owner of the land has done no act constituting a waiver or permit. Springfield v. Baxter, 180 Mo. App. 40, 45, 46, 165 S. W. 366.

⁴⁸ Bayes v. Paintsville, 166 Ky. 679, 179 S. W. 625, L. R. A. 1916B, 1027; Wood v. Hurley, 29 S. D. 269, 136 N. W. 107.

"The alienation of the property between the dates of the adjudication of invalidity and the reassessment constitutes no obstacle to the operation of the reassessment act. Purchasers may take notice of the state's power of the property they buy. Individuals can

obtain no rights against its known right of taxation or regulation. * * * The principle has been judicially applied to cases of this kind." Elkins v. Harper, 82 W. Va. 377, 95 S. E. 1033.

⁴⁹ Collins v. A. Jaicks Co. (Mo. 1919), 214 S. W. 391; St. Louis v. Missouri Pac. Ry. Co. (Mo. 1919), 211 S. W. 671; Carpenter v. Hamburg, 179 Ia. 1168, 162 N. W. 602; Re Allen, 134 N. Y. S. 557, 74 Misc. Rep. 513; West Liberty Avenue Sewer, 54 Pa. Super. Ct. 242; Dillon v. Reacon, 67 Or. 118, 134 Pac. 778; Gerlach v. Spokane, 68 Wash. 589, 124 Pac. 121.

⁵⁰ Newman v. Warner-Quinlan Asphalt Co. (Okl. 1918), 177 Pac. 375; Justice v. Asheville, 161 N. C. 62, 76 S. E. 822, 827; Re Front Street Sewer Assmt., 138 Minn. 67, 163 N. W. 978; Colby v. Medford, 85 Or. 485, 167 Pac. 487.

Evidence as to bad faith in applying statutory method. Sutcliff v. Glasco, 101 Kan. 419, 166 Pac. 496.

Presumption arises in absence of showing to the contrary that the notice to the property holders affected was given. Hendry v. Salem, 64 Or. 152, 129 Pac. 531.

Presumption that the ordinance was published as required. Belleville v. Mitchell, 273 Ill. 136, 112 N. E. 368.

Courts will not review unless as-

validity has the burden of establishing by competent evidence the contrary.⁵¹

Laws usually make special tax bills issued for a public improvement in an action thereon, *prima facie* evidence of certain things, as the regularity of the proceedings underlying their validity. Such laws are liberally construed and the probative force of such tax bills, when admitted in evidence is accompanied by the presumption indulged in favor of the authorized acts of public officers and of the validity of public records.

assessment was put on an erroneous basis. *Re West 157th St., New York City*, 134 N. Y. S. 1074, 150 App. Div. 131.

"The assessment levied by the public board must stand as correct unless shown by the landowner to be excessive." *Driscoll v. North Bridge*, 210 Mass. 151, 96 N. E. 59.

Presumption in favor of validity of assessment district fixed by the council. *Govers v. New Rochelle*, 159 N. Y. S. 221, 95 Misc. Rep. 352.

Unless the action was fraudulent or arbitrary or the officers proceeded on a fundamentally wrong basis, courts will not interfere. *Seattle Seminary v. Seattle*, 81 Wash. 125, 142 Pac. 483.

Mode of distribution in proportion to benefits is presumed equitable. *Jones v. Sheldon*, 172 Ia. 406, 154 N. W. 592, 595.

"This court will not presume from the mere fact that two separate tracts of materially in different areas are assessed the same amount that such assessment is inequitable and unjust and not according to the special benefits conferred." *Snyder v. Belle Plaine*, 180 Ia. 679, 163 N. W. 594, 596.

Where several lots are owned

and improved as one parcel, they may be assessed as one parcel, and where the roll shows such an assessment, in the absence of evidence to the contrary, it will be presumed that the property was property treated as one parcel. *Des Plaines v. Winkelman*, 270 Ill. 149, 110 N. E. 417; *Ottis v. Sullivan*, 219 Ill. 365, 76 N. E. 487.

Presumption that law was followed where the record does not disclose exact method. *Dickinson v. Guthrie Center (Iowa 1919)*, 170 N. W. 759.

Fraud will not be presumed. *Noble v. Des Moines (Iowa 1919)*, 174 N. W. 44.

⁵¹ *Northern Light Lodge v. Monona*, 180 Iowa 62, 161 N. W. 78, L. R. A. 1918A, 150; *Spalti v. Oakland*, 179 Iowa 59, 161 N. W. 17; *Chicago Rock Island & P. Ry. Co. v. Centerville*, 172 Ia. 444, 153 N. W. 106, 154 N. W. 596; *People ex rel. v. Glick*, 282 Ill. 198, 118 N. E. 466; *Chicago v. Wells*, 274 Ill. 360, 113 N. E. 695; *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999; *Williams v. Cherokee (Iowa)*, 169 N. W. 110; *Gilcrest Co. v. Des Moines (Iowa)*, 161 N. W. 645; *Rolla v. Schuman*, 189 Mo. App. 252, 175

§ 2118. When and by whom assessments may be questioned.

Assessments may be attacked by landowners required to pay, in whole or in part for the improvement, only when they have been injuriously affected by the proceeding,⁵² where complaint is seasonably made, or within the time prescribed, but not afterwards,⁵³ and provided they are not estopped for reason of their prior conduct from urging the invalidity.⁵⁴

S. W. 241; *Rawlins v. Warner-Quinlan Asphalt Co.* (Okla.), 174 Pac. 526; *Berry v. Stillwater*, 49 Okl. 560, 153 Pac. 870.

⁵² Those not injured cannot complain. *Birnie v. La Grande*, 78 Or. 531, 153 Pac. 415.

A property owner can successfully complain only of an invalid assessment upon his own property. Hence, an erroneous method of assessment of other property will not justify the court in holding valid assessments void. *Re Twentieth St. Northwest*, 95 Wash. 5, 163 Pac. 12, 14.

Property owner whose property is within the assessment district, irrespective of how established, cannot object that the district includes more property than permitted, etc., since he is not hurt, but benefited. *Schneider Granite Co. v. Gast Realty Inv. Co.*, 259 Mo. 153, 168 S. W. 687.

Failure to give notice to other property owners which does not concern one complaining or in any manner affect his rights is not important so long as his property is not taxed for more than its proper share under the plan prescribed. *Burough v. Keokuk*, 181 Ia. 660, 165 N. W. 83, 85.

'The accidental omission to assess property liable cannot be urged against the validity of the assessment by one whose assessment is not increased by reason of such omission.' *Robertson Lumber Co. v. Grand Fork*, 27 N. D. 556, 147 N. W. 249, 253.

⁵³ Assessments must be attacked (by statute) within thirty days from the time the amount due was ascertained, and cannot be questioned after that time. *Mason v. Kansas City*, 103 Kan. 275, 173 Pac. 535; *Park Assn. v. Hutchinson*, 102 Kan. 488, 171 Pac. 2.

⁵⁴ Sections 2119-2127, post; § 2119-2127, vol. 5, ante.

Illinois. Lincoln v. Harts, 256 Ill. 253, 99 N. E. 1037.

Indiana. Alsmeier v. Adams (Ind. App.), 105 N. E. 1033; *Buckingham v. Kerr* (Ind. App.), 120 N. E. 422.

Iowa. Gilcrest & Co. v. Des Moines (Ia.), 161 N. W. 645.

Kansas. Rockwell v. Junction City, 93 Kan. 1, 142 Pac. 268.

Michigan. Kuick v. Grand Rapids, 200 Mich. 582, 166 N. W. 979.

Oregon. Wilson v. Portland, 87 Or. 201, 171 Pac. 201.

§ 2119. Estoppel to question validity of assessment.⁵⁵

Irregularities in the mode of making or apportioning the assessment may be waived by word or act of the landowner.⁵⁶

Thus failure on due notice to appear at the hearing for

Utah. *Gwilliam v. Ogden City*, 49 Utah 555, 164 Pac. 1022.

Washington. *Sanderson v. Seattle*, 95 Wash. 582, 164 Pac. 217.

⁵⁵ Florida. *Anderson v. Ocala*, 67 Fla. 204, 64 So. 775.

Georgia. *Sanders v. Gainesville*, 141 Ga. 441, 81 S. E. 215.

Illinois. *People ex rel. v. Cherry*, 262 Ill. 110, 104 N. E. 209.

Kentucky. *Realty Savings Co. v. Southern Asphaltolene Road Co.*, 180 Ky. 242, 202 S. W. 679.

Louisiana. *De Ridder v. Lewis*, 139 La. 903, 72 So. 447.

Missouri. *Ford v. Philips*, 159 Mo. App. 482, 141 S. W. 907; *Municipal Securities Corp. v. Moriarty*, 195 Mo. App. 579, 583, 193 S. W. 892; *McGhee v. Walsh*, 249 Mo. 266, 15 S. W. 445; *Granite Bituminous Paving Co. v. Fleming*, 251 Mo. 210, 158 S. W. 4.

Michigan. *Fuller v. Johns*, 190 Mich. 601, 157 N. W. 76.

Oklahoma. *Chickasha v. O'Brien*, 58 Okl. 46, 159 Pac. 282; *Norman v. Allen*, 47 Okl. 74, 147 Pac. 1002; *Muskogee v. Rambo*, 40 Okl. 672, 138 Pac. 567; *Norris v. Lawton*, 47 Okl. 213, 148 Pac. 123; *Coalgate v. Gentilini* (Okl.), 152 Pac. 95; *Weaver v. Chickasha*, 36 Okl. 226, 128 Pac. 305.

Wisconsin. *Sales v. Hartford*, 161 Wis. 136, 152 N. W. 853.

West Virginia. *Damron v. Huntington*, 82 W. Va. 401, 96 S. E. 53.

Washington. *Metropolitan Bldg. Co. v. Seattle*, 92 Wash. 660, 159 Pac. 793.

None against property owner. *Raisch v. Regents of University* (Cal. App.), 174 Pac. 943.

Denying the application of the doctrine of estoppel to proceedings to enforce liens for street work. *Barber Asphalt Paving Co. v. Jurgens*, 170 Cal. 273, 149 Pac. 560, 565, relying on *Heft v. Payne*, 97 Cal. 110, 31 Pac. 844, and *Union Paving & Contracting Co. v. McGovern*, 127 Cal. 639, 60 Pac. 169.

"Mere silence, or in the language of previous judicial opinions 'passive acquiescence' does not of itself, create an irrevocable license or produce an estoppel." *Fraser v. Portland*, 81 Or. 92, 158 Pac. 514.

Where property owners ask for a cheap pavement and it is made and proves unsuitable, neither they nor their mortgage creditors have any standing to contest the enforcement of the lien for costs. *Shreveport v. Hester*, 139 La. 495, 71 So. 779.

A landowner signing as surety for the contractor, her son, held estopped to question power of city to make the contract. *O'Rielly v. Kingston*, 161 N. Y. S. 632, 175 App. Div. 207.

⁵⁶ *Remillard v. Blake & Bilger*, 169 Cal. 277, 146 Pac. 634.

consideration of the assessments,⁵⁷ or to protest or make objection,⁵⁸ may constitute estoppel against the landowner.⁵⁹

The courts very generally agree that a property owner who thinks himself injured by a wrongful assessment is, if he has knowledge of what is being done, under obligation to act promptly in interposing his objections, so that the municipality may correct the defects in its proposed action. Many courts have held that, if a public corporation has jurisdiction to levy an assessment, a property owner who makes no objection, but waits until the improvement has been made and his property has received the benefit therefrom, will not be permitted to raise objections which, if raised in time, would have rendered the assessment invalid. "His conduct estops him, or amounts to a waiver of his right, or shows such laches as debars him from relief. The public interests demand prompt objection to be made."⁶⁰

Where, however, there is an entire want of jurisdiction to order the improvement, and make any assessment at all,⁶¹ and the proceedings are as a consequence wholly

⁵⁷ Section 2124, post; § 2124, vol. 5, ante.

⁵⁸ Section 2124, post; § 2124, vol. 5, ante.

⁵⁹ *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173, 177, 178; *Pomainville v. Grand Rapids*, 157 Wis. 384, 147 N. W. 377.

⁶⁰ *Moore v. Yonkers*, 234 Fed. 485, 492, 149 C. C. A. 31.

"It is well settled in this state that a property owner who, knowing that a public improvement is being made which benefits his property, stands by without objecting until the benefits have accrued, will not be permitted to question the validity of the assessment on account of any irregularity in the proceedings; and the same rule applies when the objection to the

assessment is based upon a want of legal authority to order the improvement at the expense of abutting property, providing the proceeding was held under color of law." *Wilt v. Bueter*, 186 Ind. 98, 111 N. E. 926, 929, approving *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321.

⁶¹ *Hoover v. Newton*, 195 Mo. App. 579, 193 S. W. 892; *Sanders v. Gainesville*, 141 Ga. 441, 81 S. E. 215; *Pomainville v. Grand Rapids*, 157 Wis. 384, 147 N. W. 377.

"Where there is an entire lack of jurisdiction to order the improvement, as is the case here, it has been invariably held in this state that a property holder is not estopped from ascertaining the invalidity of the proceedings by rea-

void,⁶² no estoppel can arise,⁶³ as a basis therefor is wanting.

But it is sometimes said that proceedings had under color of law will support an estoppel.⁶⁴

Equitable estoppel based upon silence and acquiescence arises only where there is both an obligation and opportunity to speak. Estoppel may be invoked only to prevent injustices and not merely to stop the mouth from pleading and uttering the truth. A landowner is barred from contesting the validity of the proceeding resulting in the assessment by some previous action or conduct on his part which would render such contest unfair or "contrary to justice and good faith." "To make it effective the party maintaining silence must know or be in a situation to know that some one was relying on such silence or acquiescence, and acting, or about to act, as he would not have done had the other spoken and asserted his right.

son of his having failed to assert the invalidity before the work is completed." *Dyer v. Brandon*, 68 Or. 406, 136 Pac. 652.

⁶² *Moundsville v. Yost*, 75 W. Va. 224, 83 S. E. 910; *McKenzie v. Mandan*, 27 N. D. 546, 147 N. W. 808; *Pomainville v. Grand Rapids*, 157 Wis. 384, 147 N. W. 377.

⁶³ Bringing suit to enjoin proceedings wholly void, precludes the application of estoppel. *Hoosier Const. Co. v. Seibert* (Ind. App.), 114 N. E. 981, 985.

Where the entire proceeding was void a property owner affected is not estopped from seeking to enjoin the collection of the assessment by reason of having waited until the completion of the improvement. *Johns v. Pendleton*, 66 Or. 182, 133 Pac. 817, 822, 46 L. R. A. (N. S.) 990, 134 Pac. 312.

"In proceedings for levying an assessment, if the common council is without jurisdiction from the

beginning a person whose property is affected by such assessment is not estopped to deny the validity of the proceedings on the ground that he made no objection thereto while the improvement was under progress." *Jones v. Salem*, 63 Or. 126, 123 Pac. 1096, 1098.

⁶⁴ "Color of law" does not mean actual law. Color as a modifier, in legal parlance, means "appearance," as distinguished from "reality." Color of law means "mere semblance of legal right."

* * * A property owner may be estopped from questioning an assessment against his property upon the ground that the proceeding which resulted in the assessment was conducted under an unconstitutional law. * * * A law authorizing the proceedings, even though unconstitutional, affords color of law, and so also does a law which has been repealed by implication." *Wilt v. Bueter*, 186 Ind. 98, 111 N. E. 926, 929.

There is ample authority for the proposition that silence and acquiescence on the part of a property owner, who stands by and permits an improvement to be made in front of his land, knowing its progress, knowing that it is intended to pay for the improvement by a special assessment on his property, and knowing also the defects in the proceedings, will estop him from attacking the validity of the assessment by suit to restrain the collection of the cost of the same, or to vacate or cancel it, on the ground of any defect or irregularity which does not affect the jurisdiction or power of the municipality."⁶⁵

If, on the other hand, the owner did not know or could not be reasonably expected to know of certain defects (as the defective location of a curb or gutter, which was not reasonably obvious without the exercise of more attention and care than was chargeable to him), he is not estopped from questioning the assessment so far as relates to such defect.⁶⁶

The elements of the equitable estoppel applicable are: First, that the land owner knew the improvement was being made; second, that he had knowledge that the public authorities intended and were making the improvement upon the faith that the cost thereof was to be paid by the landowners and that an assessment for that purpose was contemplated; third, that he knew of the infirmity or defect in the proceedings under which the improvement was being made which would render such assessment invalid and which he is to be estopped from asserting; and fourth, some special benefit must have accrued to the owner's property, distinct from the benefits enjoyed by the citizen generally.⁶⁷

§ 2120. Same—acquiescence.⁶⁸

But where the defect is jurisdictional the doctrine of

⁶⁵ *Catts v. Smyrna* (Del. Ch.), 91 Atl. 297, 303.

⁶⁶ *Catts v. Smyrna* (Del. Ch.), 91 Atl. 297, 303.

⁶⁷ *Tone v. Columbus*, 39 Ohio St. 281, 303, 48 Am. Rep. 438.

⁶⁸ *Indiana. Haislup v. Union Asphalt Const. Co.* (Ind. App. 1919), 123 N. E. 426.

Iowa. Watson v. Mitchell (Iowa), 156 N. W. 834, approving and following *Wood v. Hall*, 138

estoppel can have no application. The property owner need not take any notice of an improvement that is made without authority. He is not to be denied the right to question the assessment of his property when it is sought to be subjected to the payment of a void tax.⁶⁹

§ 2121. Same—by petitioning for improvement.⁷⁰

Signing a petition for a specified local improvement

Ia. 308, 110 N. W. 270, and Robinson v. Burlington, 50 Ia. 240.

Kentucky. Russell v. Whitt, 161 Ky. 187, 170 S. W. 609.

Missouri. Meyer v. Bobb, 185 Mo. App. 685, 171 S. W. 600.

Oklahoma. Bickel v. Warner-Quinlan Asphalt Co. (Okl.), 174 Pac. 537; Norman v. Allen (Okl.), 147 Pac. 1002; Goodholm & Sparrow Inv. Co. v. Cleveland Trinidad Paving Co. (Okla.), 150 Pac. 109; Norris v. Lawton (Okla.), 148 Pac. 123; Muskogee v. Rambo, 40 Okl. 672, 138 Pac. 567; Weaver v. Chickasha, 36 Okl. 226, 128 Pac. 305, 308; Coalgate v. Gentilini (Okl.) 152 Pac. 95; Terry v. Hinton (Okl.), 152 Pac. 851.

West Virginia. Avis v. Allen (W. Va. 1919), 99 S. E. 188.

Under particular facts, held there was no acquiescence. Minden v. Glass, 132 La. 927, 61 So. 874.

Where a sewer was built in a private alley, and the property owner with full knowledge thereof at the time made no objections or took no steps to prevent the construction, he cannot thereafter object to the assessment therefor. Werninger v. Huntington, 78 W. Va. 107, 88 S. E. 655, 657, citing § 2120, vol. 5, ante.

Aside from failure to receive sufficient notice "in the absence

of anything else affecting the validity of the assessment, the knowledge of the abutting owners, or anyone of them, that the improvements were being made and that the cost thereof was to be assessed on their land, the improvement being of special benefit thereto, the owners are estopped, as was held by the chancellor, from denying the sufficiency of the notice." Catts v. Smyrna (Del.), 99 Atl. 281, 283, denying injunction to restrain sale of property.

Landowner of an irrigation district who with full knowledge of certain irregularities and defects in a bond issue, by silence and acquiescence as to disposition of funds arising therefrom, held estopped from objecting to the payment of an assessment against his land, where there was ample authority to issue the bonds which had not been exceeded, but the objections were rested only on certain irregularities in the manner of disposing of the bonds and irregularities in the clerical work of issuing them. Page v. Oneida Irrigation Dist., 26 Idaho 108, 141 Pac. 238, 240.

⁶⁹ Mulligan v. McGregor, 165 Ky. 222, 176 S. W. 1129, 1134, citing § 2120, vol. 5, ante.

⁷⁰ Gamma Alpha Bldg. Assn. v. Eugene (Or. 1919), 184 Pac. 973;

usually precludes the petitioner from raising questions of minor defects or irregularities relating thereto,⁷¹ but jurisdictional questions, or authority to proceed at all,⁷² or in a manner violative of mandatory requirements and property rights are not thus excluded from consideration. Moreover, the estoppel is limited strictly to the specific terms of the petition.⁷³

§ 2123. Same—by payment or part payment.⁷⁴

Colby v. Medford, 85 Or. 485, 167 Pac. 487.

⁷¹ Petitioner for improvement, held estopped. *Re Patterson*, 98 Wash. 334, 167 Pac. 924.

⁷² Signing a petition for the improvement precludes the petitioner from raising questions of irregularities on the part of the council, but he may object to the council's jurisdiction to proceed, without a sufficient petition, where this is made by law a prerequisite to council action in the premises. *Ketchikan v. Zimmerman*, 4 Alaska 336, 345, et seq.

Signing of a petition for an improvement by a trustee of lands beyond the corporate limits will not estop the owner from questioning the validity of the assessment on such lands, since the city had no power to assess such lands for a municipal improvement, and "the petition could do nothing more than a request to the city that it proceed within the powers conferred upon it by law in making the improvement. It could not act as authority to the city to proceed beyond and outside of any legal authority. And when the city departed from the exercise of its legal powers, it could not justify its departure upon the

authority of any petition requesting it to do so." *Edmonds Land Co. v. Edmonds*, 66 Wash. 201, 119 Pac. 192.

⁷³ One joining in a petition for the creation of a special improvement district to include all the property mentioned in the petition is not estopped where in creating the district, the city excluded a very considerable portion of the property. He "may have been desirous that a district be created with a large area and a correspondingly low tax, and justly opposed to the creation of a district with a less area and a higher tax." *Lewiston v. Warren*, 52 Mont. 356, 157 Pac. 954.

Property owner signed petition for certain street improvements, held not estopped from denying validity of tax bills issued to cover cost of making part of such improvements only. *Schulte v. Currey*, 173 Mo. App. 578, 585, 586, 158 S. W. 888.

⁷⁴ *Spokane v. Pittsburg Land & Imp. Co.*, 73 Wash. 693, 132 Pac. 633; *Hampton v. Gainesville*, 64 Fla. 303, 60 So. 185.

When paid by installments laws require express waiver of irregularities, or defects, jurisdictional or otherwise, in the proceeding.

§ 2124. Same—failure to object or appeal.

The general rule is that where a municipality has power to make the local improvement and acquires jurisdiction by the proper preliminary steps, objections to an assessment, not of a fundamental character, are deemed to be waived if not presented at the time and in the manner prescribed by law.⁷⁵

Such concludes questioning a reassessment although it was not authorized. *Wagoner v. La Grande*, 89 Or. 192, 173 Pac. 305, 310; *Parker v. Hood River*, 81 Or. 707, 709, 710, 160 Pac. 1158.

An agreement in writing to pay the assessments, on consideration of the purchase of the improvement bonds, signed by landowners affected, held to operate as an estoppel, to question the legality of the assessment. *Harnwell v. White*, 115 Ark. 88, 171 S. W. 108.

75 Alabama. *Ex parte Gudenrath*, 194 Ala. 568, 69 So. 629.

Colorado. *Farncomb v. Denver* (Colo.), 171 Pac. 66, 69.

Georgia. *Burns v. Atlanta* (Ga.), 97 S. E. 536.

Kentucky. *Realty Savings Co. v. Southern Asphaltoilene Road Co.*, 180 Ky. 242, 202 S. W. 679.

Louisiana. *Crowley v. Police Jury*, 138 La. 488, 70 So. 487.

Mississippi. *Bryan v. Greenwood*, 112 Miss. 718, 73 So. 728.

Missouri. *Gratz v. Kirkwood* (Mo. App.), 183 S. W. 1071.

Nebraska. *Nelson v. Florence*, 94 Neb. 847, 144 N. W. 791.

North Carolina. *Marion v. Pilot Mountain*, 170 N. C. 118, 87 S. E. 53, 56; *Felmet v. Canton* (N. C. 1919), 97 S. E. 728.

Oregon. *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

Oklahoma. *Orr v. Cushing* (Okl.), 168 Pac. 223; *Wey v. Hobart* (Okl.), 168 Pac. 433; *Goodholm & Sparrow Inv. Co. v. Cleveland-Trinidad Paving Co.* (Okl.), 150 Pac. 109.

Utah. *Stott v. Salt Lake City*, 47 Utah 113, 151 Pac. 988.

Washington. *Seattle v. Jones*, 95 Wash. 5, 163 Pac. 12.

United States. *Moore v. Yonkers*, 235 Fed. 485, 489, 149 C. C. A. 31.

Failure of property owner to raise objection to jurisdiction of the council to proceed, held he could not thereafter question the sufficiency of the resolution of necessity for the improvement. *Miller v. Oelwein*, 155 Ia. 706, 36 N. W. 1045.

Property owner on due notice failed to appear at a meeting to equalize assessments. Held, could not thereafter object that front foot rule was unfair to him because his lot had less length than other lots. *Manley v. Marshfield*, 88 Or. 482, 172 Pac. 488.

"The attack on the ordinance upon which the paving claim is based, on the ground of irregularities in the enactment thereof, and its variance with the terms proposed in the petition of the property holders, cannot be considered, for these are objections which

Thus under a law providing that all objections shall be deemed waived, except where fraud is shown unless presented to the council at the time and in the mode prescribed, failure to object precludes an injunction, unless it is shown the assessment is void.⁷⁶

Laws require objections to be made within a limited time after the publication of the ordinance or resolution fixing the special assessment, often by suit to have the enforcement thereof enjoined or its invalidity legally declared; and declare that no person not so instituting such suit shall thereafter be heard to question the validity thereof or to defend against the enforcement of the lien upon the ground of its invalidity. By virtue of such law one who does nothing to prevent the completion of an improvement, but afterwards pays a part of his assessment,

should have been urged prior to the performance of the work." *Barber Asphalt Paving Co. v. King*, 130 La. 788, 58 So. 572.

"This court in a number of cases has held that, when a city acquires jurisdiction by the proper preliminary proceedings to pave certain of its streets, a property owner who sits by and sees such improvements made with the knowledge that the city authorities intend to levy and collect a special tax against his property, and that those who do such work cannot be compensated in any other way, and there is no objection thereto until complete performance of the work has been made, cannot thereafter maintain an action to enjoin the collection of assessments against his property on the ground of alleged irregularities in the proceedings subsequent to the time of the jurisdiction to perform such work had attached." *Partee v. Cleveland-Trinidad Paving Co. (Okl.)*, 172 Pac. 945, 949.

Failure to object and institute

suit to test validity of proceedings. *Dillon v. Whitley* (Tex. Civ. App. 1919), 210 S. W. 329.

⁷⁶*Durst v. Des Moines*, 164 Ia. 82, 145 N. W. 528.

Failure to file objections, under statute is waiver. *Huntsville v. Gudenrath*, 194 Ala. 568, 69 So. 629.

Objections made, but not urged, held waived. *Des Plaines v. Winkelman*, 270 Ill. 149, 110 N. E. 417.

Filing written objections waives all not included. *Watseka v. Orebaugh*, 266 Ill. 579, 107 N. E. 887, 889; *People ex rel. v. George Moench Estate*, 277 Ill. 121, 115 N. E. 187.

Sufficiency of objections. *Atkinson v. Webster City*, 177 Ia. 659, 158 N. W. 473; *Benshoof v. Iowa Falls*, 175 Ia. 30, 156 N. W. 898.

Objection to unjust excess, and that assessment was not made on proper basis, held property owner could be relieved of that part of the assessment against him which was wrongful. *Corby v. Detroit*, 180 Mich. 208, 146 N. W. 670, 673.

can not question its validity on the ground of certain irregularities in the ordinance, not of a jurisdictional nature, after the expiration of the statutory limitation.⁷⁷

Where the law provides a tribunal to pass upon all objections to special assessments, to correct inequalities therein, and if the property owners feel themselves aggrieved appeals to the court are given them, such procedure is generally held exclusive, and the decision of the tribunal unless appealed from is also generally held conclusive on the property owners assessed, except in case of fraud, or fundamental defects or an entire want of jurisdiction.⁷⁸

After the expiration of a specified time, as sixty days, from the levy of the assessment, laws provide that no suit can be maintained on any ground except two, both of which are jurisdictional and are necessary to constitute due process of law, namely, first, that the municipality failed to acquire jurisdiction to make the improvement by the adoption and publication of the preliminary resolution, where such step is required; and second, where the municipality failed to acquire jurisdiction of the property owner by notice or hearing.⁷⁹

⁷⁷ *Hampton v. Gainesville*, 64 Fla. 303, 60 So. 185.

⁷⁸ *Evans v. Des Moines* (Iowa 1918), 169 N. W. 336; *Hubbell v. Des Moines*, 168 Ia. 418, 150 N. W. 701; *Durst v. Des Moines*, 164 Ia. 82, 145 N. W. 528, 150 Ia. 370, 130 N. W. 168; *Burkley v. Omaha*, 102 Neb. 308, 167 N. W. 72.

Sole remedy for an excessive assessment is by an appeal to the city council, and in the absence of such appeal the amount of the assessment is not open to question in a subsequent and collateral proceeding. *Empire Securities Co. v. Matthews* (Cal.), 176 Pac. 160.

If the assessment is illegal on its face an appeal to the municipal council as allowed by law, is unnecessary, since the property

owner may urge its invalidity as a defense in an action to enforce the assessment. *City Securities Co. v. Harvey*, 176 Cal. 682, 169 Pac. 380.

A statute as to appeal "can not bar the common law right of a person whose rights have been determined by a board acting judicially to have a proper review of such action. If the statute is intended to have a contrary effect it is without force." *People ex rel. v. Smith*, 152 N. Y. S. 295, 166 App. Div. 406 (sustaining certiorari) relying on *Wilcox v. Supreme Council of Royal Arcanum*, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806.

⁷⁹ *Chickasha v. O'Brien* (Okl.), 159 Pac. 282.

Finally, if the defect is jurisdictional, or mandatory requirements to preserve due process of law, have been ignored, resulting in an assessment which may be wholly void, mere silence or inaction on the part of property owners thus injuriously affected will not raise an equitable estoppel, and preclude appropriate legal action to vindicate their rights.⁸⁰

§ 2126. Same—by acceptance of benefits.⁸¹

The signing of a statutory waiver in order to secure the advantage of payment of assessments in installments, was held to operate as an estoppel.⁸²

Acceptance of the improvement by certain property owners does not preclude a general tax payer's action to vindicate the right of the city.⁸³

§ 2127. Equitable relief—injunction.⁸⁴

If the assessment is valid, of course, the chancellor will

⁸⁰ *McKenzie v. Mandan*, 27 N. D. 546, 147 N. W. 808; *Mulligan v. McGregor*, 165 Ky. 222, 176 S. W. 1129, 1134, citing § 2120, vol. 5, ante.

Ordinance passed by virtue of an unconstitutional statute is void, and failure to object does not estop. *Henderson v. Lieber's Ex.*, 175 Ky. 15, 192 S. W. 830.

⁸¹ *Hudguis v. Schultice*, 118 Ark. 139, 175 S. W. 526.

⁸² *Evans v. Des Moines (Ia.* 1918), 169 N. W. 336.

⁸³ "It is suggested that some of the plaintiffs have used some part of the sewerage system and thereby, in connection with delay with knowledge of the facts, estopped themselves from maintaining this action. The primary difficulty with that is, this is a general taxpayer's action to enforce the right and duty of the corporation to refuse to pay public money upon an illegal contract. Though a person

were precluded by some such conduct as that referred to from use of a judicial remedy to prevent his property from being burdened by a special assessment, the court might still recognize him as competent to invoke judicial power to prevent illegal use of the public fund. * * * A city cannot be estopped by laches of individual taxpayers, neither can all taxpayers of a city be estopped by the conduct of some of them. This action was to vindicate the right of the city as an entity and that of taxpayers in general. An individual taxpayer might take such a course as to be unworthy of recognition as standing for the municipality or for all taxpayers; but there was no conclusive showing of that sort in this case." *Sales v. Hartford*, 161 Wis. 136, 152 N. W. 853, 855.

⁸⁴ *Veatch v. Gibson*, 29 Idaho 609, 160 Pac. 1112; *Gratz v. Kirk-*

remain passive, and decline either to enjoin its enforcement,⁸⁵ or set it aside;⁸⁶ and although void, whether equitable relief may be invoked, and its extent, will depend alone on the controlling circumstances.⁸⁷

The enforcement of an assessment void in toto indisputably may be enjoined;⁸⁸ and if void in part, only the enforcement of such parts may be enjoined,⁸⁹ but if the

wood, 165 Mo. App. 196, 145 S. W. 870; Deming v. Metropolitan Engineering & Constr. Co., 154 Mo. App. 540, 136 S. W. 740; Walker v. Dobbins, 152 Mo. App. 270, 133 S. W. 387; Norman v. Allen (Okl.), 47 Pac. 1002, 1007-1009; North American Lumber Co. v. Blaine, 89 Wash. 366, 154 Pac. 446.

⁸⁵ Gardner v. Leavenworth, 100 Kan. 351, 164 Pac. 182; Jones v. Rosedale, 88 Kan. 641, 128 Pac. 1121; Marion v. Pilot Mountain, 170 N. C. 118, 87 S. E. 53; Lewis v. Pilot Mountain, 170 N. C. 109, 87 S. E. 56; Curtis v. Tillamook City, 88 Or. 443, 171 Pac. 574; 172 Pac. 122; Diederich v. Red Cloud (Neb. 1919), 173 N. W. 698.

⁸⁶ Moore v. Paving Improvement District, 122 Ark. 326, 183 S. W. 766.

⁸⁷ To enjoin collection where proceedings are void for want of jurisdiction, injunction will lie. Enid v. Geusman (Okl. 1919), 181 Pac. 308.

If property is included in an assessment district as a result of fraud and arbitrary action, which in effect seeks to confiscate it for the benefit of other lands, equity will interpose to stay the collection of such fraudulent assessments. Dewey v. Flint (Mich. 1919), 171 N. W. 412.

⁸⁸ Delaware. Catts v. Smyrna (Del. Ch.), 91 Atl. 297.

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Illinois. Wood v. Peoria, 271 Ill. 173, 110 N. E. 802.

Maryland. Cahill v. Gill, 139 Md. 495, 100 Atl. 834.

North Dakota. McKenzie v. Mandam, 27 N. D. 546, 147 N. W. 808; Pomainville v. Grand Rapids, 157 Wis. 384, 147 N. W. 377.

Oklahoma. Flanagan v. Tulsa, 55 Okl. 638, 155 Pac. 542; Jones v. Whitaker, 33 Okl. 13, 124 Pac. 312.

Oregon. Fraser v. Portland, 81 Or. 92, 158 Pac. 514; Johns v. Pendleton, 66 Or. 182, 133 Pac. 817, 46 L. R. A. (N. S.) 990, 134 Pac. 134; Clark v. Portland, 62 Or. 124, 123 Pac. 708.

Wisconsin. Stroughton State Bank v. Stroughton, 159 Wis. 330, 150 N. W. 418.

⁸⁹ Gwilliam v. Ogden City, 49 Utah 555, 164 Pac. 1022, 1025.

May enjoin collection of illegal item in assessment. Elliott v. Portland, 87 Or. 47, 169 Pac. 504.

Where the contract for the construction of the improvement was not invalid, although the city's part of the expense may have created an indebtedness beyond its constitutional limit, and therefore void as to the city and not collectable from the city for that reason, equity will not enjoin the collection against abutting property owners, for under such circumstances the contractor was entitled to recover the part of the costs of

void parts are not readily separable from the valid parts, the enforcement of the entire assessment may be restrained.⁹⁰

The case presented must fall within some well established head of equity jurisdiction. Divergent views still prevail among our courts relating to the function and scope of equity. Moreover, the granting of equitable relief, as an injunction, is very generally regarded as largely, at least somewhat, discretionary.⁹¹

Nor do the laws providing for these impositions establish an inflexible standard to be undeviatingly followed in all circumstances and conditions. This, of course, is not to be expected. It may be reached in part only. Nor is there uniform judicial judgment touching the discretion vested in municipal authorities in initiating and conducting the proceedings, and imposing the burden. The organic mandates announced in general terms must still be invoked to protect the right of property. Equitable relief is sought in a variety of forms.⁹²

It may be granted only for sound and substantial reasons, for equity in applications to defeat assessments, disregards slight irregularities, unimportant variances and minor departures from directory requirements.⁹³

the improvement payable by the abutting owners. *South Park Floral Co. v. New Castle (Ind.)*, 113 N. E. 5.

⁹⁰ *Wilt v. Bueter*, 186 Ind. 98, 111 N. E. 926, 931.

⁹¹ In event of conflict in facts, injunction denied. *Marion v. Pilot Mountain*, 170 N. C. 118, 87 S. E. 53.

⁹² Bill to quiet title. *Adams v. South Orange*, 80 N. J. Eq. 543, 85 Atl. 351; *McClaine v. Silverton*, 83 Or. 26, 162 Pac. 496.

To enjoin collection of assessment. *Hubbell v. Des Moines*, 168 Iowa 418, 150 N. W. 701.

To enjoin the enforcement of liens for street improvements. *Manley v. Marshfield*, 88 Or. 482, 172 Pac. 488; *Wagoner v. La Grande*, 89 Or. 192, 173 Pac. 305.

To cancel a special tax bill and to remove the cloud cast upon the title. *Gratz v. Kirkwood (Mo. App.)*, 183 S. W. 1071.

Bill by taxpayer to restrain collection. *Mushbach v. East Peoria*, 260 Ill. 27, 102 N. E. 1027.

⁹³ Objections which will not under the circumstances presented be countenanced by courts of justice may not be urged as ground for injunction. *Lyon v. Hyattsville*, 125 Md. 306, 92 Atl. 919, 923.

In addition, it must clearly appear that some recognized property right has been invaded resulting in material injury,⁹⁴ and that those whose interests are or will be adversely affected, as a consequence, are seeking equitable aid.⁹⁵

The salutary maxim that he who seeks equity must do equity may also come into play. When the landowner seeks the cancellation or preclusion of the enforcement of the assessment, either on the ground that it is excessive or void in part, he must pay or offer to pay to the proper authority the amount he concedes to be justly due.⁹⁶

Slight irregularities denied. *Orr v. Cushing* (Okla.), 168 Pac. 223.

Only on substantial grounds, as errors affecting property rights, justify injunction. Light causes, as paving of a poor quality will be disregarded. *Plagmann v. Davenport*, 181 Iowa 1212, 165 N. W. 393.

Denied because warrants were issued to contractor instead of bonds. *Sutcliff v. Glasco*, 101 Kan. 419, 166 Pac. 496.

Excessive assessment. *St. Louis & San Francisco R. Co. v. Ada* (Okla.), 167 Pac. 621.

Irregularity or defect which could have been presented on hearing for confirmation is not ground for equitable interference. *Napiralski v. West Chicago Park Comrs.*, 260 Ill. 628, 103 N. E. 547.

⁹⁴ Denied in the absence of showing of injury. *Catts v. Smyrna* (Del.), 99 Atl. 281.

To restrain special assessment for making a covered sewer out of an open one by landowner whose property did not abut on the sewer, denied, where it appeared that the property received special benefit from the construction. *Graham v.*

Grand Rapids, 179 Mich. 378, 146 N. W. 248.

⁹⁵ All whose interests would be adversely affected must be made parties prior to the rendition of the decree. *Geesey v. York*, 254 Pa. 397, 99 Atl. 27.

Several owners may join in a suit to enjoin collection. *Sanders v. Gainesville*, 141 Ga. 441, 81 S. E. 215.

Under some laws one property owner may sue for all other property owners in like situation, that is, where the question is of common interest to all such property owners. *Kvello v. Lisbon*, 38 N. D. 71, 164 N. W. 305.

⁹⁶ *Peoples' National Bank v. Marye*, 191 U. S. 285; *Meyer v. Wells*, 223 U. S. 298; *Louisville R. Co. v. Bosworth*, 209 Fed. 462; *Howcott v. Smart*, 133 La. 694.

He must offer to pay the amount of taxes which the facts show would be properly chargeable against his property under a proper assessment. *Rogers v. Bass & Harbour Co.* (Okla.), 168 Pac. 212; *Collinsville v. Ward* (Okla.), 165 Pac. 1145.

This condition, however, can not always be enforced, because from the nature of the case the legal sum due may not be readily ascertained. Obviously this rule is not applicable where the entire tax fails on account of the assessment being wholly illegal, since in such case it is impossible for the court to determine an amount due, as there is no legal tax assessed. Therefore, where it is urged that the entire assessment is void no tender of any part thereof is required in praying for an injunction.⁹⁷

Nor is the rule applicable where an injunction is sought against a legal assessment which has been extended to include certain particulars which are illegal and in excess, and where there is no data from which the amount of the tax equitably chargeable may be ascertained.⁹⁸

Nor is the rule applicable, it has been held, when the assessments are payable in installments.⁹⁹

Where relief is based on fraud or mistake, the general rule is that the nature and substance of the fraudulent conduct resulting in the mistake must be sufficiently specified, particularly if the acts alleged are those of public officers, since the presumption of legality and good faith in the performance of their public duties is ever present.¹

Aside from laches,² or statutory limitation,³ recogniz-

⁹⁷ *Watts v. Winfield*, 101 Kan. 470, 168 Pac. 319.

⁹⁸ *Wilt v. Bueter*, 186 Ind. 98, 115 N. E. 49, citing *Hughson v. Crane*, 115 Cal. 404, 47 Pac. 120.

⁹⁹ *Marshall v. Osborne* (Kan. 1919), 179 Pac. 303.

¹ *Russell v. Whitt*, 161 Ky. 187, 170 S. W. 609, 611.

² *Russell v. Whitt*, 161 Ky. 187, 170 S. W. 609, *Coalgate v. Gentilini* (Okla.), 152 Pac. 95; *Wey v. Hobart* (Okla.), 168 Pac. 433.

³ **Limitation** of statute bars action. *Burus v. Board of Sewer Improvement*, 134 Ark. 10, 203 S. W. 20.

Some statutes expressly provide

that any action or proceeding to prevent or restrain, the collection of any special assessment, or any part thereof, must be commenced within six months after the special assessment is approved. This is held to be a valid statutory enactment. *McKone v. Fargo*, 24 N. D. 53, 138 N. W. 967. Hence, if any ground for equitable interference existed, plaintiff was required to institute his action within six months after the assessment was approved, otherwise the action is barred. *Ellison v. Lamoure*, 30 N. D. 43, 151 N. W. 988, 990.

A statute restricting the time within which actions to contest the

able in equity,⁴ or word or conduct on the part of the landowner rendering applicable the doctrine of equitable estoppel,⁵ or an adequate remedy at law,⁶ by defense

validity of any assessments, held valid. *Plagman v. Davenport*, 181 Iowa 1212, 165 N. W. 393.

Statute requires action to be begun within thirty days. *Wyandotte County Board v. Haskell*, 97 Kan. 304, 154 Pac. 1029; *Armend v. Dodge City*, 97 Kan. 94, 154 Pac. 219.

After thirty days as named in the statute, the limitation cuts off all defenses of any kind and character, including assessments fraudulently made and those which were made without jurisdiction or authority. *Riverside Park Assn. v. Hutchison*, 102 Kan. 488, 171 Pac. 2; *Rockwell v. Junction City*, 92 Kan. 513, 141 Pac. 299, *Ann. Cas.* 1916B, 315.

Statute provided suit must be brought within sixty days from the enactment of the ordinance making the final assessment. *Chickasha v. O'Brien* (Okla.), 159 Pac. 282; *Warner-Quinlan Asphalt Co. v. Smith* (Okla.), 173 Pac. 516; *Schultz v. Ritterbusch*, 38 Okla. 178, 134 Pac. 961.

Limitations has no application to defects which are jurisdictional and which render the proceedings entirely void. *Grier v. Kramer* (Okla.), 162 Pac. 490; *Southern Surety Co. v. Jay* (Okla. 1918), 178 Okla. 95, 97.

Defect in the signing of the petition for the improvement, held a mere irregularity. *Bickel v. Warner-Quinlan Asphalt Co.* (Okla.), 174 Pac. 537.

⁴Laches will not always bar the

right to an injunction. It has been frequently held that the special statute of limitation is not applicable to an action mentioned to enjoin collection of a void assessment. Moreover, where the facts appeal strongly to the conscience of the court, equity will give relief. *Muskogee v. Nicholson* (Okla.), 171 Pac. 1102.

⁵Sections 2119-2126, ante; §§ 2119-2126, vol. 5, ante.

Estopped by knowing and not objecting. *Orr v. Cushing* (Okla.), 168 Pac. 223.

Failure to present objection at hearing of confirmation where it is available bars equitable relief. *Napierski v. West Chicago Park Comrs.*, 260 Ill. 628, 103 N. E. 547; *Ferall v. Spokane*, 73 Wash. 200, 131 Pac. 808.

Failure to make a defense at law where there was opportunity, bars equitable relief. "The power of courts of equity to set aside and nullify judgments of law must be exercised according to fixed rules, one of which is that it is no ground for relief in equity that a judgment is wrong in law or fact, or both, if the complaining party had an opportunity to make a defense at law and failed so to do." *Haugan v. Chicago*, 259 Ill. 249, 102 N. E. 185.

⁶*St. Avit v. Kettle River Co.*, 216 Fed. 872; *Schlanger v. West Berwick Borough*, 261 Pa. 605, 104 Atl. 764; *Geesey v. York*, 254 Pa. 397, 99 Atl. 27.

in an action to enforce the assessment,⁷ by appeal,⁸ certiorari,⁹ or otherwise,¹⁰ judicial decisions are generally agreed that equitable relief may be invoked if the municipality was without jurisdiction (1) because it had no power at all to levy the assessment,¹¹ or (2) because it

⁷ Void assessment will be enjoined where plaintiff will be compelled, in order to defeat the assessments and the liens to be imposed upon their property thereby, to resort to evidence de hors the recitals in the assessments, and to overcome the presumptive evidence clause of the statute attaching by reason of their issuance. "This necessity of a resort to extraneous evidence to defeat the lien of an assessment otherwise on its face, and by virtue of the presumption, valid, presents a proper case for the interposition of a court of equity to prevent the making of an assessment or the creation of a lien which will cast a cloud upon the title of plaintiffs." The statute provided that in suits brought by the contractor to enforce the lien of the assessment, the warrant, assessment, certificate and diagram, with the affidavit of demand and non-payment should be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the municipal authorities upon which the warrant, assessment, and diagram are based, and like evidence of the right of the contractor to recover in any action. *Owens v. Dudley*, 162 Cal. 422, 122 Pac. 1087.

⁸ *Berger v. Superior*, 166 Wis. 477, 166 N. W. 36.

Equity will not interfere on the ground that the assessments were

in excess of the benefits to the property. *Brock v. Decatur*, 185 Ala. 146, 64 So. 73.

Objection that the assessment for benefits includes elements and estimates not recognized by law, which is in effect a contention that the assessment is irregular and effective, if under the applicable law, is ground for appeal, equity will not interfere by injunction. *Safe Deposit & Trust Co. v. Baltimore*, 121 Md. 522, 88 Atl. 267.

⁹ Section 2130 post; § 2130, vol. 5, ante.

¹⁰ Section 2124, ante; § 2124, vol. 5, ante.

¹¹ Where the city has no power to levy assessments, as e. g. sidewalk construction, it may be enjoined. *Northern Light Lodge v. Monoma*, 180 Iowa 62, 161 N. W. 78.

Void assessments on property not assessable may be enjoined. *Atchison, Topeka & Santa Fe Rd. Co. v. Cherryvale*, 87 Kan. 57, 123 Pac. 874; *New York, N. H. & H. R. Co. v. Port Chester*, 134 N. Y. S. 883, 149 App. Div. 873.

Suit to cancel on ground that part of the improvement was on private property, denied under particular facts. *Albers v. Acme Paving & Crusher Co.*, 196 Mo. App. 265, 194 S. W. 61.

Usually equity will interfere only (1) where the assessment is not authorized by law (2) or is levied on property not subject to

failed to secure jurisdiction by taking the mandatory steps required,¹² or (3) if in conducting the proceeding at any stage it exceeded its power, e. g., adopted a method of assessment, contrary to the applicable law,¹³ or a mode of apportionment not in conformity with mandatory requirements,¹⁴ which resulted in contravening the constitutional provision of due process of law, equal protection of the laws, or taking private property without just compensation.¹⁵

The decree will grant the appropriate relief,¹⁶ free the land of the assessment, if necessary,¹⁷ cancel the certi-

such taxation, or, (3) by unauthorized persons. *Wilson v. Portland*, 87 Ore. 507, 169 Pac. 90, 171 Pac. 201.

12 Where there is no jurisdiction to proceed with the improvement, equity will enjoin the levy of the assessment. *Dyer v. Brandon*, 68 Ore. 406, 136 Pac. 652.

A petition is fatally defective if it fails to allege facts to show want of jurisdiction in the municipal authorities to make the improvement and to levy and collect the taxes to pay for the same, brought after the expiration of sixty days after the assessment was levied, in view of a statute fixing such limitation as an absolute bar for all objection except that of want of jurisdiction to levy the assessment. *Terry v. Hinton (Okla.)*, 152 Pac. 851.

13 Where the method of assessment is not illegal or oppressive and the property owner has not been injured no cause for injunction exists. *Catts v. Smyrna (Del.)*, 99 Atl. 281.

14 In the construction of a sewer if in making assessments therefor approximate equality has been accomplished, equity will not enjoin

collection. *Whitsett v. Carthage*, 270 Mo. 269, 193 S. W. 21.

Mistake in the apportionment of the costs of an improvement. Complainant must allege facts showing the mistake, and also such facts as would show that under a different and correct method of apportionment the complainant would be required to pay less than under the method adopted by the municipal authorities, that he was injured, etc. *Russell v. Whitt*, 161 Ky. 187, 170 S. W. 611.

15 Latonia v. Carroll, 151 Ky. 165, 151 S. W. 400; *White Townsite Co. v. Moorhead*, 121 Minn. 1, 138 N. W. 939; *Stover v. Springfield*, 167 Mo. App. 328, 152 S. W. 122; *Adams v. South Orange*, 80 N. J. Eq. 543, 85 Atl. 351; *McKone v. Fargo*, 24 N. D. 53, 138 N. W. 967; *McMillan v. Barber Asphalt Co.*, 151 Wis. 48, 138 N. W. 94.

16 Relief where several land holders seek to enjoin the collection of the assessment. *Hendry v. Salem*, 64 Ore. 152, 129 Pac. 531; *Smith v. Jefferson*, 75 Ore. 179, 146 Pac. 809.

17 Lapp v. Marshfield, 72 Ore. 573, 144 Pac. 83.

ificate, tax bills, etc., and where part of the assessment is void and part valid, the former parts may be cancelled, and the latter permitted to stand.¹⁸

§ 2128. Reassessments.

The conditions under which reassessments or additional or supplemental assessments may be made depend, of course, upon the proper construction of the controlling local laws, as applied to the status of the particular proceeding when such action is sought to be taken.¹⁹

¹⁸ Board of Improvements v. Southwestern Gas & Electric Co., 121 Ark. 105, 180 S. W. 764.

¹⁹ California. Mardis v. McCarthy, 162 Cal. 94, 121 Pac. 389; Barnard Co. v. Los Angeles, 18 Cal. App. 698, 124 Pac. 88; Rockbridge Place Co. v. Oakland (Cal.), 172 Pac. 1110.

Illinois. Lincoln v. Harts, 266 Ill. 405, 107 N. E. 725.

Indiana. Curless v. Watson, 54 Ind. App. 110, 100 N. E. 576.

New York. People ex rel. v. Smith, 152 N. Y. S. 295, 166 App. Div. 406; People ex rel. v. Pierce, 171 N. Y. S. 772, 104 Misc. Rep. 343.

Nebraska. Weise v. South Omaha, 100 Neb. 492, 160 N. W. 890.

N. Dakota. Kvello v. Lisbon, 38 N. D. 71, 164 N. W. 305.

Oregon. Reiff v. Portland, 71 Ore. 421, 141 Pac. 167, rehearing denied 142 Pac. 827; Wagoner v. La Grand, 89 Ore. 192, 173 Pac. 305.

Texas. Gallahar v. Whitley (Tex. Civ. App.), 190 S. W. 757, 759, quoting with approval greater part of § 2128, vol. 5, ante.

Washington. Nichols v. Spokane, 91 Wash. 235, 157 Pac. 863; Kuehl

v. Edmonds, 85 Wash. 307, 148 Pac. 19; Eggerth v. Spokane, 91 Wash. 221, 157 Pac. 859; Hapgood v. Seattle, 69 Wash. 497, 125 Pac. 965.

Wisconsin. Burnham v. Milwaukee, 155 Wis. 90, 143 N. W. 1067.

West Virginia. Elkins v. Harper, 82 W. Va. 377, 95 S. E. 1033.

When reassessment laws do not apply. McMillan v. Barber Asphalt Paving Co., 151 Wis. 48, 138 N. W. 94.

If the original assessment is in fact void, usually a reassessment may be made. Hapgood v. Seattle, 69 Wash. 497, 125 Pac. 965; Inner-Circle Property Co. v. Seattle, 69 Wash. 508, 125 Pac. 970.

Municipality may be estopped from levying a supplemental assessment. Re Patterson, 98 Wash. 334, 341, 342, 167 Pac. 924.

When a body or tribunal empowered to make an assessment fails to make a valid assessment by reason of some irregularity in the proceedings, an assessment made by a tribunal duly authorized cannot be regarded as a reassessment. Auburn v. Paul, 113 Me. 207, 93 Atl. 289.

When a municipal body makes and confirms an assessment

It is commonly provided, in substance, that when the assessment proceeding is so defective that valid levies cannot be based thereon, or where the mode or apportionment of the assessment is so irregular or inequitable, that it cannot stand the test of legal scrutiny, a new, supplemental or reassessment may be made and laws so providing are generally recognized as valid and constitutional.²⁰

Failure of the ordinance to define the improvement district, resulting in the first assessment being declared void, authorized a new assessment.²¹

which is not void on the face of the proceedings, its authority is exhausted, and it cannot proceed by supplemental action to a new assessment. "It is clear, we think also, that even when the record shows vital jurisdictional defects, if the defendant property owner had appeared and waived them, as he may do, by contesting the assessment only as to its propriety in fact, there can be no occasion for reassessment by the municipal body after the objection is overruled and final assessment is once made, and hence a reassessment would be a nullity." *Huntsville v. Pulley*, 187 Ala. 367, 65 So. 405, 407.

Law must authorize. *Enid v. Gensman* (Okla. 1919), 181 Pac. 308.

Power to reassess, held implied under particular law. *Stotts v. Meese* (Cal. App. 1918), 178 Pac. 727.

²⁰ The Portland Charter empowers the municipality to correct all manner of errors and irregularities whether they be "jurisdictional or otherwise." *Wilson v. Portland*, 87 Ore. 507, 171 Pac. 201, 169 Pac. 90.

Reenactments and amendments;

proceedings thereunder authorized. *Kuehl v. Edmonds*, 91 Wash. 195, 157 Pac. 850, 85 Wash. 307, 148 Pac. 19.

Reassessment or supplemental assessment; enlargement of district authorized. *Eggerth v. Spokane*, 91 Wash. 221, 157 Pac. 859.

Reassessment may be made by the court. *McKenzie v. Mandan*, 35 N. D. 107, 160 N. W. 852.

Where the assessment is so inequitable that only a new assessment can make it uniform, it will be vacated as an entirety, and new assessment ordered by the court. *Franklin Society v. Haworth Borough*, 85 N. J. L. 533, 89 Atl. 772.

²¹ Reassessment authorized where the original assessment was declared void because the ordinance creating the improvement district failed to define properly the limits thereof, under a statute allowing it where the proceedings were "defective, irregular or void, including among other things the want of jurisdiction," unless the original assessment was "for an unauthorized purpose" or there was "an entire and complete want of authority to proceed in the premises."

So a reassessment may be ordered to correct errors of description or errors in the name of the owner.²²

Where the first assessment does not sufficiently describe the property to be assessed, to sustain it, mandamus lies to compel a reassessment.²³

In making a reassessment, sometimes each step is required to be taken anew.²⁴

However, the method of initiating and conducting the proceeding for a reassessment, and the precedent conditions authorizing such action, as mentioned, are matters to be answered by sound application of the local laws relating to the subject. Under particular laws it has been held that if the improvement ordinance is void a new assessment cannot be based thereon, however, if such ordinance is not a nullity, but merely defective and insufficient and amendable, the rule is otherwise;²⁵ and that if the assessment is void because the work was illegally done no new assessment can be made for such work.²⁶

As a prerequisite to a reassessment the original assessment must, of course, be set aside by appropriate action.²⁷ Hence a contractor who accepts and retains the

Weise v. South Omaha, 100 Neb. 492, 160 N. W. 890.

²² Texas Bitulithic Co. v. Henry (Tex. Civ. App.), 197 S. W. 221.

²³ Oklahoma Ry Co. v. Severns Pavings Co. (Okla.), 170 Pac. 216.

²⁴ Garner v. Anniston, 178 Ala. 430, 59 So. 654, reversing 2 Ala. App. 389, 56 So. 874.

If notice in first assessment is not given and hence no jurisdiction to make it a reassessment is invalid, without beginning de novo, giving notice, etc. Murray v. La. Grande, 76 Or. 598, 149 Pac. 1019.

²⁵ Lincoln v. Harts, 256 Ill. 253, 99 N. E. 1037; Geneseo v. Schultz, 257 Ill. 273 100 N. E. 926; Chicago v. Galt, 25 Ill. 568, 80 N. E. 285.

²⁶ Campbell v. Haven, 211 Mass. 121, 97 N. E. 611.

²⁷ Chicago v. Rice, 256 Ill. 209, 99 N. E. 924; Phillips v. Longport Borough (N. J. L.), 100 Atl. 192; Hapgood v. Seattle, 69 Wash. 497, 125 Pac. 965.

Authorized when assessment is declared void whether original or supplemental. By ordinance only. Triangle Traders v. Brewerton, 89 Wash. 214, 154 Pac. 193.

Resolution ordering, to show cancellation of former assessment. Hochfeld v. Portland, 72 Or. 190, 142 Pac. 824.

The reassessment ordinance cannot include interest on the deferred installments of the original assessment. Lincoln v. Harts, 270 Ill. 646, 110 N. E. 912.

amount of an assessment duly confirmed, pursuant to the estimated costs, although such amount is less than the contract price, cannot by mandamus compel an additional assessment.²⁸

On reassessment the court cannot control the judgment of those selected to make it with respect to the amount or proportion of benefit. It can only direct the proceeding according to the legal requirements, and not exact that the assessment shall be made in accordance with the opinion of the court.²⁹

The reassessment, of course, must be upon examination and evidence, observance of due process of law, and not arbitrary.³⁰

§ 2129. Appeals from assessments.

The conditions permitting appeals,³¹ and when allowed, the manner,³² and time of taking and perfecting,³³ are of

²⁸ State ex rel. v. Peru, 182 Ind. 689, 107 N. E. 737.

²⁹ Re St. Raymond Ave., New York City, 162 N. Y. S. 185, 175 App. Div. 518, stating that "if left unmodified that might coerce the judgment of the commissioner with respect to determining and apportioning the benefits."

³⁰ Re Washington Ave., New York City, 156 N. Y. S. 796, 171 App. Div. 342.

³¹ Authorized without objection before the board making the assessment. Dunn v. Superior, 148 Wis. 636, 135 N. W. 145.

"The authorities are very numerous and practically unanimous to the effect that where a taxpayer desires to enjoin the collection of a tax levied to pay the cost of a public improvement for which his property is assessed, he, except for fraud or collusion or jurisdictional defects, must move lively, and if

any particular remedy is provided by law, must pursue that remedy." Stott v. Salt Lake City, 47 Utah 113, 151 Pac. 988, 992, citing section 1929, vol. 4, ante.

³² Bass v. Bangor, 111 Me. 390, 89 Atl. 309.

Sufficiency of transcript. Re Patterson, 98 Wash. 334, 167 Pac. 924.

Law allowing is to be followed. Appeal of Second North School Dist., 92 Conn. 193, 102 Atl. 574.

Bond, sufficiency of. Gerlach v. Spokane, 68 Wash. 589, 124 Pac. 121.

The general rule well settled is often invoked that where the proceeding is a special statutory one the general rules of practice in civil actions are applicable when the statute is silent. Haynes Automobile Co. v. Kokomo, 186 Ind. 9, 114 N. E. 758.

³³ Must be within time named.

statutory origin, as appeals were unknown to the common law. Therefore, unless expressly granted no appeal lies from the action or decision of a tribunal conducting special proceedings.³⁴

Appeals are generally allowed,³⁵ however, some laws make no provision for them.³⁶

The method of presentation of the record to the court, the manner of consideration of the questions raised, and the judgment authorized are sometimes specified with much particularity.³⁷ In Illinois, a party appealing from

Katsch v. New Haven, 86 Conn. 326, 85 Atl. 523; Birmingham v. Collins (Ala.), 78 So. 385.

As an appeal is a purely statutory remedy, the requirements to the exercise of the right must be complied with, as the filing of an affidavit in the form prescribed, otherwise the court is without jurisdiction to hear the appeal. A court can take jurisdiction to itself by disregarding or relaxing the condition imposed by the legislature only as it usurps legislative power. Such defect can not be cured by amendment after the time allowed for the appeal has passed. *Butler Engine & Foundry Co. v. Butler Borough*, 283 Pa. 180, 85 Atl. 1112.

³⁴ Allowed only in judicial proceedings, and then only when permitted by law. *Indianapolis v. Hawkins*, 180 Ind. 382, 103 N. E. 10.

An appeal is a privilege, not a constitutional right, and can only be granted by the sovereign power; that alone has the power to impose the tax. *Auburn v. Paul*, 110 Me. 192, 85 Atl. 571, 573.

³⁵ Alabama. *Huntsville v. Gudenrath*, 194 Ala. 568, 69 So. 629; *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676.

Illinois. *Ottawa v. Colwell*, 260 Ill. 548, 103 N. E. 573.

Iowa. *Chicago Great Western Ry. Co. v. Council Bluffs*, 176 Iowa 247, 157 N. W. 947; *Re Jefferson Street Sewer*, 179 Iowa 975, 162 N. W. 239; *Dickinson v. Waterloo*, 179 Iowa 946, 162 N. W. 242.

Maryland. *Baltimore v. Johnson*, 123 Md. 320, 91 Atl. 156.

New York. *People ex rel. v. Smith*, 152 N. Y. S. 295, 166 App. Div. 406.

Washington. *Bolcom Mills v. Seattle*, 94 Wash. 583, 162 Pac. 1010 (see *City M. C.*); *Trimble v. Seattle*, 93 Wash. 472, 161 Pac. 381.

"An assessment is a final judgment which can be reviewed only by an appeal seasonably taken therefrom in accordance with the provisions" of the statute. *Brock v. Decatur*, 185 Ala. 146, 64 So. 73; *Birmingham v. Wills*, 178 Ala. 198, 59 So. 173; *Woodlawn v. Durham*, 162 Ala. 565, 50 So. 356.

³⁶ *McCague Inv. Co. v. Metropolitan Water Dist.*, 101 Neb. 820, 165 N. W. 158.

³⁷ *Bass v. Bangor*, 111 Me. 390, 89 Atl. 309.

From order confirming objections and consideration. *Re Patterson* 98 Wash. 334, 167 Pac. 924.

an order of confirmation must raise all the questions presented by the record on his appeal, and if he fails to do so, cannot raise questions which then existed on a subsequent appeal.³⁸

On appeal a presumption as to the regularity of the proceeding exists.³⁹

Therefore, in the absence of fraud or arbitrary action, courts hesitate to disturb estimates, etc., in assessment proceedings, although some doubt may arise as to certain benefits approved.⁴⁰

The necessity for an improvement is committed to the judgment of the municipal authorities and that judgment is conclusive unless the evidence clearly satisfies the court that their action is unreasonable and oppressive; and when there is room for a reasonable difference of opinion,

Decision of commissioners as to special assessments can be reviewed by trial court, but it is not open to review on appeal or writ of error. *Staunton v. Bond*, 281 Ill. 568, 118 N. E. 47; review restricted. *Re Blondell Ave.*, 167 N. Y. S. 789, 180 App. Div. 430.

On appeal, trial by jury may be had. *Huntsville v. Pulley*, 187 Ala. 367, 65 So. 405.

Issues may be determined by court without a jury, if legislature so allows. *Tuscaloosa v. Hill*, 14 Ala. App. 514, 69 So. 486.

Method of review, the making up of the record and the evidence for consideration by the court and judgment rendered all are controlled by statute and local practice. *Sloss-Sheffield Steel Co. v. Birmingham (Ala.)*, 78 So. 896.

Method of raising question for review, the consideration of them by the reviewing court and the judgment that may be entered thereon are all controlled by the statutes applicable and the local

practice. *People ex rel. v. Ward*, 272 Ill. 65, Ill. N. E. 557; *Belle-ville v. Mitchell*, 273 Ill. 136, 112 N. E. 368; *Oak Park v. Lane*, 275 Ill. 420, 114 N. E. 146; *Haynes Automobile Co. v. Kokomo*, 186 Ind. 9, 114 N. E. 758.

³⁸ *Lincoln v. Harts*, 270 Ill. 646, 110 N. E. 912.

Failure to raise objections in the county court, held waiver on appeal. *Kankakee v. Illinois Central R. R. Co.*, 257 Ill. 298, 100 N. E. 996.

³⁹ *Burnham v. Abrahamson*, 21 Cal. App. 248, 131 Pac. 338.

On evidence action affirmed. Court could not order different assessment nor direct such. *Noble v. Des Moines (Ia. 1918)*, 174 N. W. 44.

⁴⁰ *Re Public Playgrounds, New York City*, 157 N. Y. S. 991, 93 Misc. Rep. 289.

Review of assessment and damages in condemnation proceedings. *Des Plaines v. Winkelman*, 270 Ill. 149, 110 N. E. 417.

their action will be regarded as final and will not be disturbed by a reviewing court.⁴¹

Judicial decisions generally sustain the rule that there will be no disturbance of the finding "unless the evidence so preponderates against the judgment as to indicate an arbitrary disposition on the part of the commissioners or the court."⁴²

Accordingly, on appeal, in the absence of a contrary showing, benefits will be presumed and the finding of the municipal council, or local tribunal will not be disturbed.⁴³

In brief, a finding of special benefits to property from the improvement, is conclusive on appeal, in the absence of contrary record facts.⁴⁴

Where the question of the amount of the assessment was tried on the report of an officer who found it excessive, there being no other evidence presented, and where under the law such report was made *prima facie* evidence of all facts so reported, a verdict, it was held by the reviewing court, was properly directed by the trial court if upon that report only one conclusion was possible as a matter of law.⁴⁵

In a Wisconsin case it is said: "The remedy by appeal being exclusive the court will grant either equitable

⁴¹ Chicago v. Kehilath Anshe Mayriv, 284 Ill. 210, 119 N. E. 905.

⁴² Re Seattle, 66 Wash. 327, 119 Pac. 852.

Objection that the apportionment of the cost of an improvement is inequitable cannot be considered on appeal where the statute makes the county court's determination of that question conclusive. *Highwood v. Chicago & Milwaukee El. R. Co.*, 268 Ill. 482, 109 N. E. 270.

⁴³ *Vail v. Chariton*, 181 Iowa 296, 164 N. W. 597.

⁴⁴ *Appeal of Dellaripa*, 88 Conn. 565, 92 Atl. 116.

Finding property benefited, not reviewable, because of conflict of

evidence, except in cases of fraud, mistake, arbitrary action, constituting abuse of discretion, or where the action is put on a fundamentally wrong basis, or where the law controlling has been ignored. *Trimble v. Seattle*, 93 Wash. 472, 161 Pac. 381.

On the question of benefit to the property where the testimony is conflicting the reviewing court will not interfere, even although a larger number of witnesses testified contrary to the finding. *Chicago v. Vierling*, 277 Ill. 51, 115 N. E. 181.

⁴⁵ *Driscoll v. Northbridge*, 210 Mass. 151, 96 N. E. 59.

or legal relief, or both as each case may require. And ordinarily equity will relieve against a mere mistake of fact where no laches are shown, and the other party has not materially changed his position relative to the subject-matter."⁴⁶

§ 2130. Certiorari to review assessments.⁴⁷

Certiorari is said to be closely akin to a writ of error. Its issuance rests in the discretion of the court. When granted the questions to be determined are such only as appear upon the record. It is generally held that the writ will be allowed, to bring up for review the legality of tax assessments made by taxing boards, or special assessments for public improvements.⁴⁸

Certiorari will lie to review the proceedings of municipal boards when their proceedings are judicial or quasi-judicial and there is no right of appeal. The writ will not lie if the relator has any other adequate remedy.⁴⁹

The object of the writ is to review the action of a body

⁴⁶ *Dunn v. Superior*, 148 Wis. 636, 135 N. W. 145, 148.

⁴⁷ *St. Vincent's Church v. Madison Borough*, 86 N. J. L. 567, 92 Atl. 348; *Walsch v. Edgewater Borough*, 87 N. J. L. 338; 93 Atl. 887; *Reiff v. Portland*, 71 Or. 421; 141 Pac. 167, 142 Pac. 827.

Certiorari to quash a sewer assessment levied nearly seventeen years after the building of the sewer. Court would not say that the assessment was illegal, nor that the complainant had suffered by the delay. *Hester v. Thompson*, 217 Mass. 422, 105 N. E. 631.

⁴⁸ *District of Columbia v. Whitmer*, 39 App. D. C. 334.

Writ of review to correct errors committed by a council in a reassessment of property for a street improvement. *Hochfeld v. Portland*, 72 Or. 190, 142 Pac. 824.

Statutes forbid either certiorari or injunction to set aside any ordinance or resolution for any public improvement, etc., after thirty days have elapsed from the date of the adoption of the resolution or ordinance. *Whittingham v. Midburn*, 90 N. J. L. 344, 100 Atl. 854.

The theory of the writ is that the proceeding for the assessment appears upon the fact of its record without the power and jurisdiction of the municipal authorities acting in the premises, and so is null and of no effect. *Pierce v. Huntsville*, 185 Ala. 490, 60 So. 301.

⁴⁹ *State ex rel. v. Red Wing Board of Public Works*, 134 Minn. 204, 158 N. W. 977.

Remedy by appeal. *Florenzi v. East Orange*, 88 N. J. L. 438, 97 Atl. 260.

having jurisdiction of a given subject-matter for the purpose of correcting errors where no appeal is otherwise available.⁵⁰

On certiorari the court will not review contested questions of fact. It may determine whether the inferior tribunal observed the law, and may remand the proceeding for further consideration on its merits. It may find whether the method prescribed by law for exercising the power to levy assessments and which are essential to the validity of the proceedings have been observed. The inferior tribunal cannot materially depart from the method laid down on the ground that a different mode which was adopted was just as effectual to protect the property holders.⁵¹

VIII. COLLECTION AND ENFORCEMENT.

§ 2131. Nature of the proceedings—in rem or personam.

In most jurisdictions an action to enforce the lien of an assessment or special tax bill is in the nature of a proceeding in rem against the property, the sole object being the enforcement of the lien, and the payment of the judgment can be enforced only by a sale of the property.⁵²

There can be no personal liability against the owner.⁵³

⁵⁰ *People ex rel. v. Hart*, 132 N. Y. S. 827, 75 Misc. Rep. 137.

⁵¹ *People v. Smith*, 216 N. Y. 95, 110 N. E. 174, reversing 152 N. Y. 195, 166 App. Div. 406.

Matters reviewable on. *Birmingham v. Collins* (Ala.), 78 So. 385.

⁵² *Morey Engineering & Const. Co. v. St. Louis Artificial Ice Rink Co.*, 242 Mo. 241, 259, 146 S. W. 1142; *Missouri Real Estate and Loan Co. v. Gibson* (Mo. App. 1920) 220 S. W. 675.

⁵³ *Kirkwood v. Handlan*, 182 Mo. App. 626, 628, 168 S. W. 346; *Snetzer v. Gregg*, 129 Ark. 542, 196

S. W. 925, L. R. A. 1917F, 999; *Mt. Sterling v. Montgomery County*, 152 Ky. 637, 153 S. W. 952.

“The assessment is against the property and not against the owner of the property. It cannot be made a personal liability against the owner.” *Chicago v. Marsh*, 251 Ill. 298, 96 N. E. 250; *Spring Creek Drainage District v. Elgin, Joliet & E. Ry. Co.*, 249 Ill. 260, 94 N. E. 529; *Huston v. Tribbetts*, 171 Ill. 547, 49 N. E. 711, 63 Am. St. Rep. 275.

“There is no personal liability on the part of any owner of the

However, the power of the legislature to impose personal liability is sometimes sustained.⁵⁴

Thus in Indiana personal responsibility for any deficit after the sale of the property on the foreclosure of the

land by reason of the assessment, but simply a separate lien on each lot of land for the particular amount assessed thereon." *Realty Const. & Mtg. Co. v. Superior Court*, 165 Cal. 543, 132 Pac. 1048.

⁵⁴ Personal liability. *Dallas v. Atkins* (Tex. Civ. App.), 197 S. W. 593.

In Texas the power of the legislature to impose a personal liability is expressly upheld. *Eubank v. Ft. Worth* (Tex. Civ. App.), 173 S. W. 1003, denying personal liability against a married woman under a municipal charter.

"Nor was it beyond legislative authority to make the assessments personal debts against owners of the properties assessed." *Werninger v. Stephenson*, 82 W. Va. 342, 95 S. E. 1035, 1039.

The legislature has a constitutional right to create a personal liability on the property owner for assessments and provide for collection thereof by personal action. "Personal liability may flow from the failure to perform a duty, whether that duty be created by law or by contract. We cannot see why the legislature may not create a personal liability for a special assessment as well as for a general tax. It is as much the citizen's duty to pay the one as the other when lawfully levied. Neither is a debt in the ordinary sense; but both are obligations to the government, in this instance to the municipality." The statute may allow

the city to determine the manner by ordinance of collection a special assessment. *Mt. Mary's v. Locke*, 73 W. Va. 30, 80 S. E. 841.

"Where the only statutory remedy is a proceeding in rem, an assessment cannot be recovered by a personal action, and it may very well be that a personal action will not lie against a non-resident for the recovery of an assessment against his property; but we know of nothing to prevent the general assembly from authorizing the proceeding in person as well as in rem, as has been done in this instance, in so far as residents of the state are concerned." *De Ridder v. Lewis*, 139 La. 903, 72 So. 447, distinguishing *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1354, 26 So. 70, which held that a statute referring to the city of New Orleans did not prescribe any personal liability, and concluding: "Further consideration of the question of the personal liability of the defendants under the act has led us to the conclusion that there is little or no difference in that respect between the provisions of that act and those referring to the city of New Orleans, and that, considering these statutes, respectively, in all their parts, and also the general jurisprudence upon the subject, the better construction is that adopted by the court in *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1354, 25 So. 70."

lien is authorized where the landowner, for the privilege of paying the assessments in installments, signed the statutory requirement waiving irregularities, etc.⁵⁵

Under some laws, the action is not in rem until after jurisdiction of the subject-matter has been acquired by the court in which the action is being prosecuted.⁵⁶

As the action is in rem against the property it follows that no parcel, piece of land or lot is liable for any part of the assessment on any other lot, although the same person is the owner of both parcels, pieces or lots.⁵⁷

In California there is a separate cause of action as to each lot of land separately assessed under a single contract and assessment, notwithstanding the same person may own two or more of such lots.⁵⁸

§ 2132. Form of action—valid assessment as basis.

The method for the enforcement of the assessment or the lien created therefor, the form of action, and procedure is determined by the requirement of the applicable local laws.⁵⁹

The mode specially prescribed by statute or charter,⁶⁰

⁵⁵ Gubbins v. Harrington, 48 Ind. App. 488, 96 N. E. 31.

⁵⁶ Barber Asphalt Paving Co. v. Field, 174 Mo. App. 11, 14, 161 S. W. 364; Charter Oak Land & Lumber Co. v. Bippus, 200 Mo. 688, 697, 98 S. W. 546.

⁵⁷ Realty Const. & Mtg. Co. v. Superior Court, 165 Cal. 543, 132 Pac. 1048.

⁵⁸ Realty Const. & Mtg. Co. v. Superior Court, 165 Cal. 543, 132 Pac. 1048.

⁵⁹ To foreclose a lien by municipality. Ketchikan v. Zimmerman, 4 Alaska 336.

To foreclose the assessment lien. Gubbins v. Harrington, 48 Ind. App. 488, 96 N. E. 31; Windfall City v. Somerville, 181 Ind. 463, 104 N. E. 859; Schaefer v. Hines,

56 Ind. App. 17, 102 N. E. 838; Hutton v. Newhouse (Cal. App. 1919), 183 Pac. 276.

Suit on special tax bill. Granite Bituminous Paving Co. v. Parkview Realty & Imp. Co., 168 Mo. App. 468, 151 S. W. 479; Barber Asphalt Paving Co. v. Field, 174 Mo. App. 11, 161 S. W. 364; Kirkwood v. Handlan, 182 Mo. App. 626, 168 S. W. 346; Fellows v. Dorsey, 171 Mo. App. 289, 157 S. W. 995.

Action for amount of the assessment, with a lien on the property charged, and mandamus against public officers requiring them to make provision for payment. Mt. Sterling v. Montgomery County, 152 Ky. 637, 153 S. W. 952.

⁶⁰ Prescribed by statute. Carstens & Earles v. Seattle, 84 Wash.

is usually exclusive,⁶¹ and the steps required, of course, should be followed.⁶²

The holdings of the courts are quite uniform that the petition or complaint is sufficient if it alleges all facts required by the statute.⁶³

88, 146 Pac. 381; *People ex rel. v. Chicago Title & Trust Co.*, 266 Ill. 224, 107 N. E. 198.

By statute or charter. *State ex rel. v. Kotecki*, 156 Wis. 278, 146 N. W. 528.

Charter provisions as to the enforcement and collection of special taxes or assessments for public improvements must yield to the paramount authority as state statute on the same subject. *Kansas City v. Field*, 270 Mo. 500, 194 S. W. 39.

⁶¹ "By lien on action assumption." *Philadelphia v. De Armond*, 63 Pa. Super. Ct. 436.

Statute prescribed a complete and exclusive method by scire facias and for revival of judgment in like manner. *Scranton v. Genet*, 232 Pa. 272, 81 Atl. 335.

When the legislature has authorized a method of collection, that method is exclusive. Thus, where the statute authorizes a proceeding in rem, a recovery of a personal judgment against the land owner for the sum of the assessment is not authorized. If the statute provides no means for collecting the assessment, an action at law would lie to collect the same. *Decatur v. Southern Ry. Co.*, 187 Ala. 364, 65 So. 536.

⁶² Prior to suit, notice of delinquency to be served on landowner. *Gubbins v. Harrington*, 48 Ind. App. 488, 96 N. E. 31.

In actions prescribed by statute all conditions precedent and all

requisites therein named are to be observed. *Schaefer v. Hines*, 56 Ind. App. 17, 102 N. E. 838.

⁶³ Sufficiency of petition. *First National Bank v. Shewalter*, 153 Mo. App. 635, 134 S. W. 42; *Brambrick Bros. Const. Co. v. McCormick*, 157 Mo. App. 198, 137 S. W. 43.

The petition to foreclose the lien should show on its fact that the applicable law has been complied with in all respects. *Ransome-Crummey Co. v. Bennett*, 177 Cal. 574, 171 Pac. 304.

Need not allege all steps taken by the municipal authorities, or legislative body and other matters for doing the work by the contractor. *Fellows v. Dorsey*, 171 Mo. App. 289, 297, 157 S. W. 995, 997.

Suit to foreclose assessment lien, as provided by statute. Sufficiency of complainant. *Schaefer v. Hines*, 56 Ind. App. 17, 102 N. E. 838; *Millikan v. Crail*, 177 Ind. 426, 98 N. E. 291.

Sufficiency of complaint in action to foreclose a street assessment lien. *Richmond Construction Co. v. Browney*, 29 Cal. App. 427, 155 Pac. 1008.

Sufficiency of petition in an action by the contractor against the municipality. *Woodruff Place v. Gorman*, 179 Ind. 1, 100 N. E. 296.

Sufficiency of petition under particular law against property owner on a sewer assessment. *Hag-*

Notice of the institution of the suit to be filed with a designated officer is sometimes required.⁶⁴

§ 2133. Same—action at law.⁶⁵

§ 2134. Same—warrants.⁶⁶

§ 2136. Same—scire facias.⁶⁷

§ 2137. Same—execution.⁶⁸

§ 2138. Same—in equity.⁶⁹

gart v. Alton, 28 S. D. 509, 137 N. W. 372.

Petition by municipality to enforce an apportionment lien for sidewalk construction, etc.; sufficiency under particular law. *Richmond v. Madison Female Institute*, 153 Ky. 301, 155 S. W. 371.

The contents of the tax bill need not be pleaded in haec verba. *Ballatin v. Netherton*, 189 Mo. App. 24, 176 S. W. 495.

⁶⁴ Notice of institution of suit required; held not applicable to lien taking effect prior to such requirement going into effect. *Ruecking Const. Co. v. Withnell*, 269 Mo. 546, 557-559, 191 S. W. 685; *Gilsonite Const. Co. v. Greffet*, 174 Mo. App. 176, S. W.

Notice required within ten days after institution of suit to be filed with a named city officer; held not to condition the right to sue upon the giving of such subsequent notice, nor the right to maintain the suit for such failure after its institution. As the notice was not jurisdictional, all objects legitimately within its scope may be subserved by filing it prior to the trial and the expiration of the period for the lapse of the lien of

the tax bill. *Bambrick Bros. Const. Co. v. Semple Place Realty Co.*, 270 Mo. 40, 459, 460, 193 S. W. 543.

⁶⁵ *Bassett v. Ocean City*, 118 Md. 114, 84 Atl. 262; *Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 192 Mich. 65, 158 N. W. 164.

Assumpsit by municipality. *Philadelphia v. De Armond*, 63 Pa. Super. Ct. 436.

⁶⁶ Suit on warrant to subject property charged with its payment. *Cave Hill Cemetery Co. v. Gosnell*, 156 Ky. 599, 161 S. W. 980.

⁶⁷ *Scranton v. Genet*, 232 Pa. 272, 81 Atl. 335.

⁶⁸ *Randall Bros. v. Atlanta*, 22 Ga. App. 301, 95 S. E. 1016; *Burns v. Atlanta*, 22 Ga. App. 381, 96 S. E. 11.

⁶⁹ Suit in the chancery court to enforce the lien against the property, but no personal judgment shall be rendered against the property owner; the extent of the judgment shall only be to condemn and sell the property improved for the purpose of paying the tax assessed against it. *Grenada v. Grenada County*, 115 Miss. 831, 76 So. 682.

§ 2139. When assessment is due.⁷⁰

§ 2140. When assessment becomes delinquent.⁷¹

Pending litigation to determine the validity of an assessment, it cannot become delinquent in the sense that it is subject to penalty.⁷²

§ 2141. Demand of payment.⁷³

⁷⁰ Granite Bituminous Paving Co. v. Parkview Realty & Imp. Co., 168 Mo. App. 495, 151 S. W. 486; Driscoll v Northbridge, 210 Mass. 151, 96 N. E. 59; State ex rel. v. Red Wing Board of Public Works, 134 Minn. 204, 158 N. W. 977; Dunn v. Superior, 148 Wis. 636, 135 N. W. 145.

Notice to property owner before it becomes due, but notice may be waived. Bush Contr. Co. v. Withnell, 190 Mo. App. 33, 42, 175 S. W. 260.

Payable in installments, etc. Eyermann v. Stevens, 185 Mo. App. 168, 170 S. W. 330.

Interest. Veatch v. Moscow, 24 Idaho 461, 134 Pac. 551.

Begins to run from the time the amount is ascertained. "Until that time the landowner is in no default; he cannot pay until the amount is known." Newark Homebuilders' Co. v. Bernard Tp., 90 N. J. L. 361, 103 Atl. 692.

⁷¹ Texas Bitulithic Co. v. Henry (Tex. Civ. App.), 197 S. W. 221.

Payable in installments. Donahue v. La Grange, 263 Ill. 607, 105 N. E. 762.

Interest. Koch v. Shepherd (Mo. App.), 193 S. W. 601.

Interest and attorney's fees. Gallahar v. Whitley (Tex. Civ. App.), 190 S. W. 757.

When interest allowed. Madi-

son County v. Winterset, 164 Iowa 223, 145 N. W. 492; Schultz v. Ritterbusch, 38 Okla. 178, 134 Pac. 961; Colby v. Medford, 85 Or. 485, 167 Pac. 487; Elliott v. Portland, 87 Or. 47, 169 Pac. 504; Schmuck v. Wheeler, 98 Wash. 535, 167 Pac. 1126; Walsh v. Barthel, 85 Conn. 552, 84 Atl. 91.

⁷² Barber Asphalt Paving Co. v. District Court, 181 Iowa 1265, 163 N. W. 214, following Rystad v. Buena Vista County, 170 Iowa 178, 152 N. W. 364.

Penalty in the form of interest. Whitehead v. Mackey (Okla.), 163 Pac. 124.

Penalty after assessment becomes delinquent is based on whole assessment. Cake v. Los Angeles, 164 Cal. 705, 130 Pac. 723.

⁷³ Required by ordinance. Church v. Grady (Cal. App. 1919), 180 Pac. 548.

Condition precedent to collection by legal process. Drennen v. White, 191 Ala. 274, 68 So. 41.

Sufficiency of. Milliken v. Crail, 177 Ind. 426, 98 N. E. 291.

May be made by the contractor although he assigned his claim, since "the property owner is not concerned over this matter." Stanwood v. Carson, 169 Cal. 640, 147 Pac. 562, 566.

An allegation that demand was made upon "defendant or his

§ 2142. Limitation of actions.⁷⁴

Under a statute expressly providing that the action is not barred until two years after the last installment has become due, where the tax bills were issued in seven installments as authorized, a suit instituted on all the tax bills before the last installment become due is not barred.⁷⁵

A statute requiring notice of suit instituted on a special tax bill to be filed within ten days with a named city officer, and declaring that unless such notice is filed and suit is brought within two years the lien shall cease, it has been held, does not condition the right to sue, or to maintain the suit after its institution, upon the filing of the notice, since all legitimate objects of the notice are

agents," held, if a defect, it amounts to an uncertainty only, and cannot be reached by general demurrer under the California Code. *Bienfield v. Van Ness*, 176 Cal. 585, 169 Pac. 225.

Cash payment. The abutting property owner must pay his assessment for street improvement in cash unless the city assigns the bill to the contractor, under the charter. *Cooney v. Atlanta*, 138 Ga. 105, 74, S. E. 837, 136 Ga. 118, 70 S. E. 950.

⁷⁴*Barber Asphalt Paving Co. v. King*, 130 La. 788, 58 So. 572; *Granite Bituminous Paving Co. v. Parkview Realty & Imp. Co.*, 168 Mo. App. 495, 151 S. W. 486.

Limitation of statute prevails over charter as to execution. *Kansas City v. Field*, 270 Mo. 500, 194 S. W. 39.

Action must be brought within limitation period, otherwise it is barred. *United States National Bank v. Superior, T. & T. Ry. Co.*, 160 Wis. 669, 152 N. W. 459.

After the expiration of the prescribed limitation no suit will lie. *Macon v. Sparrow & Hayner*, 197 Mo. App. 654, 198 S. W. 1136.

Two years' limitation when not payable in installments. *Parker-Washington Co. v. Bradley*, 197 Mo. App. 447, 196 S. W. 111.

Set off allowed the landowner for improvements made to his property, held not subject to statutory limitation. *Casey v. Tront*, 114 Ark. 359, 170 S. W. 75.

Necessary parties defendant, as mortgagee, should be brought in within the period of limitation. *Granite Bituminous Paving Co. v. Parkview Realty & Imp. Co.*, 199 Mo. App. 226, 201 S. W. 933.

⁷⁵*Ruecking Const. Co. v. Withnell*, 269 Mo. 546, 559, 191 S. W. 685.

When payable in installments, the limitation usually runs after the last installment is due. *Parker-Washington Co. v. Bradley* (Mo. App.), 196 S. W. 111.

subservd if it is filed before the trial and the expiration of the lien.⁷⁶

§ 2144. Parties plaintiff.⁷⁷

§ 2145. Same—assignee.⁷⁸

§ 2146. Parties defendant—owners of land.

To confer jurisdiction the action must have a defendant who owns the land sought to be charged or some interest or estate in it, and the judgment can affect only such interest or estate. The purpose is to enable such defendant to contest the validity of the proceedings as a charge upon the property, and to discharge the lien, if he so desires, without sale thereof.⁷⁹

⁷⁶ The law "intended to direct that notice thereof shall be given ten days after suit. It does not condition the right to sue upon the giving of a subsequent notice, nor the right to maintain a suit for failure to give notice after its institution. Such a notice is not in any sense a summons or other method of giving the court jurisdiction and could answer neither purpose, since it is only enjoined after the suit has been brought and after jurisdiction of the person or property have attached. All the object legitimately within the scope of this notice are subserved by it, as was done in the present case, is filed before the trial and expiration of the time fixed for the lapse of the lien of the tax bill." *Bambrick Bros. Construction Co. v. Semple Place Realty Co.*, 270 Mo. 450, 459-460, 193 S. W. 543.

⁷⁷ *California v. Kiesling* (Mo. App.), 180 S. W. 559; *Gunn v. Shewalter* (Mo. App.), 176 S. W. 484.

If instituted by the one entitled

to recover, whether the contractor or the municipality, the other is not a necessary party plaintiff. *Melvin v. Central Const. Co.* (Ky. 1919), 215 S. W. 811.

⁷⁸ *National Exchange Bank v. Smith* (Ind. App.), 114 N. E. 881; *Loomis v. Chicago & N. W. Ry. Co.*, 31 S. D. 408, 141 N. W. 386.

If the tax bill is void by reason of illegal or defective performance of the improvement work, on assignment thereof, the assignee has no rights thereunder. *Bank of Commerce v. Ruffin*, 190 Mo. App. 124, 175 S. W. 303.

If the transfer or assignment of an improvement certificate is made after the filing of the suit and during its tendency the assignor can further prosecute the suit for the benefit of the assignee and the assignee would not be a necessary party. *Kernagan v. Ft. Worth* (Tex. Civ. App.), 194 S. W. 626.

Proof of assignment. *Schmidt v. Santa Monica Commercial Club* (Cal. App. 1919), 178 Pac. 315.

⁷⁹ *Barber Asphalt Paving Co. v.*

The owner against whom the bill has been issued and who was the sole legal owner at the time the lien of the tax bill attached, is the only necessary party defendant in proceedings for the enforcement of its lien.⁸⁰

§ 2147. Same—wife of property owner.⁸¹

§ 2148. Same—all parties in interest—mortgagee.

A mortgagee of record is a necessary party.⁸²

So is the holder of a lien on the land sought to be charged arising under a will,⁸³ and perhaps beneficiaries of prior incumbrancers.⁸⁴

In an action by a contractor against a municipality, property owners who had paid the money for which the contractor was suing should be made parties defendant where they so ask by intervention proceedings.⁸⁵

Field, 174 Mo. 11, 14, 161 S. W. 364.

Actions of special tax bills are proceedings in rem, and parties defendant may be brought in by amendment though original defendants are not the owners. Koch v. Shepherd (Mo. App.), 193 S. W. 601; Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Company, 242 Mo. 241, 259, 146 S. W. 1142, 40 L. R. A. (N. S.) 119, Ann. Cas. 1913C, 1200.

⁸⁰ Granite Bituminous Paving Co. v. Parkview Realty & Imp. Co., 168 Mo. App. 468, 151 S. W. 479, 481.

⁸¹ Against his wife as owner and husband who claimed an interest. Schaefer v. Hines, 56 Ind. App. 17, 102 N. E. 838.

⁸² Granite Bituminous Paving Co. v. Parkview Realty & Imp. Co., 199 Mo. App. 226, 201 S. W. 933.

⁸³ Werninger v. Huntington, 78 W. Va. 107, 88 S. E. 655.

⁸⁴ Beneficiaries of prior incumbrancers upon the land hold the same right against the lien of a special tax bill as the junior mortgagee holds against the prior mortgagee. The former is a proper party to any proceedings to enforce the superior lien by foreclosure, but he is not a necessary party. "It is next to impossible to reconcile the various conflicting decisions of the appellate courts in this state on the question whether in proceedings for enforcement of special tax bills, incumbrances prior in time and record are necessary parties to enforce the bill against the property." Granite Bituminous Paving Co. v. Parkview Realty & Imp. Co., 168 Mo. App. 468, 151 S. W. 479, 481.

⁸⁵ Woodruff Place v. Gorman, 179 Ind. 1, 100 N. E. 296.

§ 2151. Joinder of actions.⁸⁶

In California, different causes of action may be united in the same complaint where the different liens are created by a single assessment. However, such authority does not imply compulsion. The right of joinder being optional with the plaintiff, the bringing of a separate action as to each cause of action gives defendant no legal ground of complaint.⁸⁷

§ 2152. Defenses illustrated.

The law is well settled that irregularities and defects in the assessment proceeding which are not jurisdictional do not constitute a defense in an action to collect the assessment or enforce the lien.⁸⁸

Statute generally conclude the property owner from interposing defenses of this nature.⁸⁹

⁸⁶ Barber Asphalt Paving Co. v. Crist, 21 Cal. App. 1, 130 Pac. 435.

⁸⁷ Realty Const. & Mtg. Co. v. Superior Court, 165 Cal. 543, 132 Pac. 1048.

⁸⁸ Necessity for the improvement cannot be questioned. Ainsworth v. Arizona Asphalt Paving Co., 18 Ariz. 242, 158 Pac. 428; Hardwick v. Dalton, 140 Ga. 633, 79 S. E. 553.

Lack of equality and uniformity in assessments, held no defense, as area rule, where certain property was vacant and unimproved, or by front foot, irregularities in depth, or combination. Granite Bituminous Paving Co. v. Fleming, 251 Mo. 210, 158 S. W. 4; Perkinson v. Weber, 251 Mo. 186, 157 S. W. 961.

Costs of intersections were not properly prorated. Rolla v. Schuman, 189 Mo. App. 252, 175 S. W. 241.

Confiscation of property cannot

be raised. Meyers v. Wood, 173 Mo. App. 564; 158 S. W. 909.

Omission to raise. "The law is well settled that no objection to an assessment can be made on application for judgment and order of appeal which could have been raised on the application for confirmation, unless it goes to the jurisdiction of the court to enter the judgment of confirmation, and which lack of jurisdiction must appear upon the face of the record." People ex rel. v. Belz, 252 Ill. 296, 96 N. E. 910; People ex rel. v. Walleck, 254 Ill. 78, 98 N. E. 249.

⁸⁹ Irregularities in the proceedings in making, ordering or directing the assessment denied as a defense by statute. Schaefer v. Hines, 56 Ind. App. 17, 102 N. E. 838.

Defense relating to the irregularity of the proceeding and the question of special benefits are usually

Accordingly all objections to such defects which might have been presented and urged at some stage of the proceeding, as on confirmation,⁹⁰ and which were not so presented and urged,⁹¹ are uniformly regarded as waived, by express statute,⁹² under the doctrine of estoppel,⁹³ or by virtue of judicial decision.⁹⁴

Moreover, statutes and municipal charters generally declare the regularity and validity, *prima facie*, of assessment proceedings.⁹⁵

Ordinarily matters which should have been raised by the pleading on the part of the defendant cannot be urged at the trial,⁹⁶ e. g., objection to the form of the lien.⁹⁷

barred by statutes providing that irregularities and decision of special benefits should be deemed conclusively determined before the tribunal authorized to pass on the same. *Thompson v. Mitchell*, 54 Ind. App. 258, 100 N. E. 20.

⁹⁰ Statute bars defenses and objections which might have been presented on confirmation. *People ex rel. v. Belz*, 252 Ill. 296, 96 N. E. 910; held to include whether the improvement was within the municipal area. *People ex rel. v. Walleck*, 254 Ill. 78, 98 N. E. 249.

⁹¹ *Winnfield v. Collins* (La.), 78 So. 747.

That work was defective, by failure to protest within reasonable time. *Ainsworth v. Arizona Asphalt Paving Co.*, 18 Ariz. 242, 158 Pac. 428.

⁹² Statute provides the court shall disregard irregularities and defects. Where property owner made no objection to method of assessment when levied, he cannot thereafter raise a question as to such method. *Haggart v. Alton*, 38 S. D. 527, 162 N. W. 158.

⁹³ Section 2119, et seq., ante.

Defense of defect in notice of

the proceedings is waived by appearance of the property owner and of course, cannot be set up as a defense. *People ex rel. v. Brown*, 261 Ill. 73, 103 N. E. 559.

⁹⁴ Irregularities in the enactment of the improvement ordinance, and its variance with the terms of the petition of the property holders. Such objections should be urged prior to the performance of the work. *Barber Asphalt Paving Co. v. King*, 130 La. 788, 790, 58 So. 572.

⁹⁵ In suit on tax bills regular on their face, a *prima facie* case is made, and the burden to rebut it is on the defendant to show such material defects in the proceedings or the work as render the tax bills void. *Miner's Bank v. Clark*, 252 Mo. 20, 26, 252 S. W. 20.

Statute, declaring that assessment warrants, etc., are *prima facie* evidence of their legality, held valid. *Ainsworth v. Arizona Asphalt Paving Co.*, 18 Ariz. 242, 158 Pac. 428.

⁹⁶ *Pittsburgh, C. C. & St. L. Ry. Co. v. Schmuck*, 181 Ind. 323, 103 N. E. 325.

⁹⁷ *York v. Miller*, 254 Pa. 436, 98 Atl. 1049.

Generally speaking the property owner may, by answer, interpose any defense or objection which assails on the merits, the validity of the tax or assessment. He may show fraud, mistake, want of authority, or failure to comply with any mandatory provision of the law. He may set up the fact that the assessment contains illegal items.⁹⁸

⁹⁸ State ex rel. v. Red Wing Board of Public Works, 134 Minn. 204, 158 N. W. 977.

Sufficiency of affidavit of defense to action by a municipality to the use of the contractor who constructed the improvement, under particular law. Philadelphia v. Edmonds, 59 Pa. Super. Ct. 318.

Decision by supreme court on the invalidity of assessment proceedings is controlling in a suit by the contractor to enforce the lien. Hoosier Construction Co. v. Seibert (Ind. App.), 114 N. E. 981.

It is no defense that there are liens upon the land improved as a public highway. Philadelphia v. Peters, 62 Pa. Super. Ct. 90.

Written notice of institution of suit to be given ten days thereafter and filed with city comptroller; held failure to give available as defense to defendant. Gilsonite Const. Co. v. Greffet, 174 Mo. App. 176, 156 S. W. 765. See Bambrick Bros. Const. Co. v. Semple Place Realty Co., 270 Mo. 450, 459, 460, 193 S. W. 543.

Failure to comply substantially with the contract is good defense. Buis v. Nestler (Mo. App. 1918), 203 S. W. 221.

Work not performed according to contract, specifying, of course. Work was accepted. Held, binding on property owners, in absence

of allegation and proof of fraud. Shreveport v. Chatwin, 139 La. 531, 71 So. 791.

The defendant may prove that the improvement was negligently made and not completed and that by failure defendant suffered damage. "Owners of land are entitled to have the contracts for municipal improvements, which are paid for by assessments on their lands substantially performed. The specific injury, however, must relate to the portion charged against their respective properties." York City v. Miller, 60 Pa. Super. Ct. 407.

Improvement partly incomplete, cost of unfinished part should be deducted. Maryville v. Cox, 181 Mo. App. 254, 167 S. W. 1166.

Fraud. Rudolph S. Blome Co. v. Herd (Tex. Civ. App.), 185 S. W. 53.

Fraud to be a defense must be known to be contractor who does the work. Mullins v. Mount St. Mary's Cemetery Assn., 259 Mo. 142, 152, 168 S. W. 685.

Rebates to property holder by contractor. Laws forbid. Do not apply when granted after the work has been done, and it does not appear that they were allowed pursuant to any previous understanding that might have unduly influenced those interested in the

The defense of want of jurisdiction is always available, as that no power existed to levy the burden,⁹⁹ that the property was not subject to the imposition,¹ that the street improved was not a public way,² (unless the doctrine of estoppel should be applicable),³ that the law under which action was taken is unconstitutional,⁴ that the assessment is void on its face,⁵ or omission of notice and hearing.⁶

§ 2153. Counterclaim.⁷

work. Barber Asphalt Paving Co. v. King, 130 La. 788, 791, 58 So. 572, relying on Ayers Asphalt Co. v. Hill, 118 La. 640, 43 So. 262.

Offer of discount by contractor for prompt payment of bill, is not a fraud. Backliffe-Gibson Constr. Co. v. Zielda-Forssee Investment Co., 170 Mo. App. 93, 97, 156 S. W. 66.

Secret rebate granted to certain property owners, to allay opposition, renders tax bills void. Platt v. Parker-Washington Co., 161 Mo. App. 663, 670, 144 S. W. 143.

⁹⁹ Where the work was repairs, and not repaving or reconstruction, and the tax bills were for the latter, under a law providing a different method of assessment for repairs, held good defense. Parker-Washington Co. v. Meriwether, 172 Mo. App. 344, 158 S. W. 74.

Defense that the law under which the city government which imposed the assessment was organized was afterwards held unconstitutional, denied. Wendt v. Berry, 154 Ky. 586, 157 S. W. 1115, 45 L. R. A. (N. S.) 1101.

Legality of incorporation of drainage district. Buschling v. Ackley, 270 Mo. 157, 192 S. W. 727.

¹ People ex rel. v. Bloomington

Cemetery Assn., 266 Ill. 32, 107 N. E. 143.

² Presumption arises that it is public; burden on defendant property owner to prove contrary. Miller v. L. R. Figg Co., 175 Ky. 495, 194 S. W. 566.

³ A purchaser of lots agreeably to a plan showing streets, etc., implies that the streets thereon shown are public, and cannot defend against an assessment for street improvement on the ground that before the street could be open he must give his consent. Appeal of Sturges, 240 Pa. 44, 87 Atl. 592.

⁴ Winnfield v. Collins (La.), 78 So. 747.

⁵ An assessment void on its face may be set up as a defense, notwithstanding statutes forbidding defenses of irregularities, etc., unless taken advantage of before the board. Schaeffer v. Smith, 169 Cal. 764, 147 Pac. 976.

⁶ Millikan v. Crail, 177 Ind. 426, 98 N. E. 291; Kernagan v. Ft. Worth (Tex. Civ. App. 1917), 194 S. W. 626.

Invalidity, burden of proving is on defendant. Parker-Washington Co. v. Field (Mo. App. 1919), 214 S. W. 402.

⁷ Denied. Bayes v. Paintsville, 166 Ky. 679, 179 S. W. 623, 626,

§ 2154. Sale of property.⁸

§ 2155. The purchaser's title.⁹

"A purchaser at a sale for a street assessment in the

L. R. A. 1916B, 1027; Hardingsburg v. Mercer, 172 Ky. 661, 189 S. W. 1117.

Counter for damages due to improvement, denied. Herndon v. Brawner, 180 Ky. 807, 203 S. W. 727, 730.

Counterclaim for granite block which had been removed by contractor, denied. Philadelphia v. Edmonds, 59 Pa. Super. Ct. 318, 324, relying on McCracken v. Elder, 34 Pa. 239.

Money owing to defendant from plaintiff for stone, held could be set off. York City v. Miller, 60 Pa. Super. Ct. 407.

Set off allowed by statute, where the landowner has improved his property in such a manner as to render the betterment available when improvements are made by the public authorities. When allowed and a certificate therefor showing the amount thereof is given the property owner he may set up such claim in an action to enforce the assessment. Casey v. Trout, 114 Ark. 357, 170 S. W. 75.

* Cabell v. Board of Improvement Dist., 124 Ark. 278, 187 S. W. 666; Empire Securities Co. v. Matthews, 179 Cal. 239, 176 Pac. 160; O'Neil v. Brode (Cal. App. 1919), 181 Pac. 91; Redeemer v. Perkinson (Mo. App.), 186 S. W. 1107; Dubois v. Lowery (Tex. Civ. App.), 205 S. W. 858.

Sufficiency of judgment. Beasley v. Bratcher, 114 Ark. 512, 170 S. W. 249.

Judgment and order of sale. People ex rel. v. George Moench

Estate, 277 Ill. 121, 115 N. E. 187.

Judgment and order of sale may be reviewed by appeal or writ or error. Failure to obtain a supersedeas does not bar right. People ex rel. v. Chicago Title & Trust Co., 266 Ill. 224, 107 N. E. 198.

Form of judgment and order of sale prescribed by statute; held insufficient in a particular case. People ex rel. v. Chicago Title & Trust Co., 266 Ill. 224, 107 N. E. 198.

Notice of sale, sufficiency. People ex rel. v. Chicago Title & Trust Co., 270 Ill. 591, 110 N. E. 820, 273 Ill. 203, 112 N. E. 659.

Time of advertising. Beasley v. Bratcher, 114 Ark. 512, 170 S. W. 249.

Sale of railroad right of way. Decatur v. Southern Ry. Co., 183 Ala. 531, 62 So. 855; Georgia Ry. & El. Co. v. Atlanta, 144 Ga. 722, 87 S. E. 1058; Georgia R. Co. v. Decatur, 137 Ga. 537, 73 S. E. 830, 40 L. R. A. (N. S.), 935.

In the absence of an enabling statute a municipal corporation cannot become a purchaser, since the general power to buy and hold real estate does not authorize such purchase. O'Connell v. Sanford, 256 Ill. 62, 99 N. E. 885; Champaign v. Harmon, 98 Ill. 491.

Where statute confer the power and the city become a purchaser it must proceed the same as any other purchaser under the general revenue laws. Ibid.

* Miller v. Winslow, 70 Wash. 401, 126 Pac. 906.

absence of fraud is governed by the rule of *caveat emptor*, and after the purchase, if it transpires that the assessment is void, such purchaser obtains no title to, or equity in, the purchased land.”¹⁰

All purchasers are after the time of redemption, vested with absolute title to the property, including a municipal corporation. It acquires the same rights and occupies no superior position.¹¹

§ 2156. Redemption of the property.¹²

Unless the right of redemption is exercised within the limit fixed by the law, the title of the purchaser becomes absolute.¹³

As a judgment foreclosing the lien for the improvement does not affect the title or interest of any person not made a party to the suit, an owner whether legal or equitable has the right of redemption after sale.¹⁴

§ 2156a. Recovery of assessments paid.

Voluntary payment of special assessments cannot be recovered.¹⁵ Where the city collects special assessments from property owners and pays the amounts so received to the contractor, no common law action for money had and received can be maintained against the city in behalf of such property owners, although unlawfully collected. “The basis of a common law action for money

¹⁰ *Duniway v. Cellars-Murton Co.* (Or. 1919), 179 Pac. 561, 563, following *Evans v. Meridian Investment & Trust Co.*, 84 Or. 246, 163 Pac. 1165; *Keenan v. Portland*, 27 Or. 544, 38 Pac. 2.

¹¹ *Gould v. St. Paul*, 120 Minn. 172, 139 N. W. 293, 296.

Requirements of law as to, to be observed. Great strictness is usually required. Every substantial legal requirement must be adhered to. *Drennen v. White*, 191 Ala. 274, 68 So. 41.

¹² *Warden v. Bittleston Law & C. Agency* (Cal. App. 1919), 181 Pac. 834; *O’Neil v. Brode* (Cal. App. 1919), 181 Pac. 91.

¹³ *Lanz v. Fishburn*, 17 Cal. App. 583, 120 Pac. 1068, 1072; *Duff v. Randall*, 116 Cal. 226, 48 Pac. 66, 58 Am. St. Rep. 158.

¹⁴ *Halsey v. Thrailkill*, 237 Mo. 713, 141 S. W. 592.

¹⁵ *Louisville v. Belknap Hardware & Mfg. Co.*, 145 Ky. 266, 140 S. W. 185.

had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same."¹⁶

A right of action to recover money paid on account of the levy and collection of any unlawful tax by any municipality was held not to include special assessments.¹⁷

Payment of an assessment after it became a lien on property, it is held in Michigan, is not voluntary, but is equivalent to a payment under compulsion. In such case specific protest is not required, since the payment is made under legal duress.¹⁸

In an equitable action of assumpsit to recover back an assessment paid under protest, for the reason that it was inequitable and unjust and not made on a proper basis under the applicable law, it is permissible to give plaintiff judgment for the amount his tax was unjustly increased because of the wrongful assessment, together with the penalties, interest and fees relating thereto and collected, (assuming that the record supply ample data therefor), without vacating the whole assessment.¹⁹

§ 2156b. Refund.

Under a law authorizing a refund for special assessments paid for water mains "to all persons" who have paid such taxes, in case of conveyance of property by

¹⁶ *Marine Co. v. Milwaukee*, 151 Wis. 239, 138 N. W. 640, 642.

¹⁷ *Marine Co. v. Milwaukee*, 151 Wis. 239, 138 N. W. 640.

¹⁸ *Newberry v. Detroit*, 184 Mich. 188, 150 N. W. 838, relying on *Thompson v. Detroit*, 114 Mich. 502, 72 N. W. 320, and stating: "While good reason may be advanced for questioning the wisdom of the rule thus established, a change with reference thereto, in our opinion, should now be sought

in the legislature rather than in the courts. Therefore, in harmony with the ruling in the *Thompson* case, we conclude that a tax paid after a lien attaches to the property because of it must be held to have been paid under legal duress, and is not a voluntary payment."

¹⁹ *Corby v. Detroit*, 180 Mich. 208, 146 N. W. 670, following *Fletcher v. Alpena*, 160 Mich. 462, 125 N. W. 405.

an owner who has paid such exaction, the grantor and not the grantee should receive the refund.²⁰

Land owners paying special assessments to a fund to pay bonds issued to cover the actual cost and expenses of the improvement in excess of the sum required, due to miscalculation or mistake, are, in equity, justly entitled to have such excess refunded to them, each landowner to receive the excess paid by him, that is, the excess should be prorated among the property owners, as it may appear that each has paid. Such money, when collected from the several property owners becomes a trust fund, to be used only for the purpose specified, and when the bonds and interest and other legal expenses chargeable against such fund were satisfied, the balance belonged to the landowner. Each lot or parcel of land in the improvement district must bear its equal share in the total cost and no more.²¹

²⁰ Borton v. Portland, 62 Or. 544, 125 Pac. 847.

²¹ Spitzer v. El Reno, 41 Okla. 430, 138 Pac. 797.

CHAPTER 39.

FINANCIAL POWERS IN GENERAL.

- II. POWER TO BORROW, LOAN, AND GIVE NOTES OR ISSUE BILLS.
- III. POWER TO INCUR INDEBTEDNESS AND MAKE EXPENDITURES.
- IV. COLLECTION AND DISTRIBUTION OF FUNDS.
- V. APPROPRIATIONS.

II. POWER TO BORROW, LOAN, AND GIVE NOTES OR ISSUE BILLS.

- § 2160. Power to borrow money.
- § 2161. Power to execute promissory notes.

III. POWER TO INCUR INDEBTEDNESS AND MAKE EXPENDITURES.

- § 2164. General rules.
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- § 2167. Same—illustrations of what are and what are not public purposes.
- § 2168. Same—moral claims.
- § 2170. Same—aid to private corporations or associations.
- § 2171. Same—constitutional prohibitions against donations.
- § 2172. Conditions precedent and procedure.
- § 2173. Necessity for first making provision for payment of debt.
- § 2175. Certificate that funds are applicable or indebtedness lawful.
- § 2176. Effect of unauthorized debts or expenditures.

IV. COLLECTION AND DISTRIBUTION OF FUNDS.

- § 2178. Estimates of probable expenditures.
- § 2179. General and special funds.
- § 2181. Custody of funds.
- § 2182. Adjustment of accounts with state or county.
- § 2184. Transfer of moneys from one fund to another.
- § 2185. Payment of debts.
- § 2186. Effect of insufficient funds.
- § 2186a. Preference of municipality.

V. APPROPRIATIONS.

- § 2187. Definition, classification and power to make.
- § 2188. Necessity for.
- § 2189. Annual appropriations.

§ 2190. Ordinance, passage and contents. § 2192. Mandamus to compel appropriations.

§ 2191. Effect of appropriations.

II. POWER TO BORROW, LOAN AND GIVE NOTES OR ISSUE BILLS.

§ 2160. Power to borrow money.

The power to borrow money and create indebtedness is not an incident to local government, and such power cannot be exercised unless it is conferred by charter or statute.¹

Thus a town or city treasurer has no authority by virtue of his office to borrow money on behalf of the town or city of which he is treasurer.²

However, power to provide a water supply carries with it as a necessary incident the authority to make such subsidiary contracts as are essential to effectuate the purpose of the power, including power to borrow money to pay the expense of moving the pumping station of its water plant to another site.³

§ 2161. Power to execute promissory notes.⁴

Power to borrow money and thereby contract a debt, carried with it the authority to agree with the creditor as to the time and mode of its payment, and to give a proper written acknowledgement thereof, as a note.⁵

Notes must be executed as prescribed. Thus where they are required to be countersigned by the majority

¹ Merchants' Loan & Trust Co. v. Chicago, 264 Ill. 76, 105 N. E. 726; Coquard v. Oquawka, 192 Ill. 255, 61 N. E. 660.

² Brown v. First National Bank, 216 Mass. 298, 103 N. E. 780.

³ Forest City v. Bank of Forest City, 116 Ark. 377, 172 S. W. 1148.

⁴ Validity of consideration sustained, although erroneously recited in the notes. McCrary Co. v. Brantley (Ala.), 79 So. 602.

Providing for interest in a note executed by a municipality, in violation of the state constitution, does not invalidate the note, but the provision as to interest, being void, may be regarded as surplusage. Forest City v. Bank of Forest City, 116 Ark. 377, 172 S. W. 1148, 1151.

⁵ Forest City v. Bank of Forest City, 116 Ark. 377, 172 S. W. 1148, 1150, 1151.

of the town selectmen, notes issued without being so countersigned are void.⁶

While a recital on the face of notes made by the officers of a municipality charged with the duty of ascertaining the existence of necessary facts precedent to their valid issuance will estop the municipality from showing the nonexistence of those facts as against a bona fide holder of the notes, such recital made without authority as where the proper officers never had the opportunity to exercise the right of determining the existence or non-existence of the facts, and never having certified to them, the town cannot be held to have made a recital as to the valid execution of the notes which would be binding on it.⁷

Where the law confers no authority upon a town or city treasurer to impose upon the municipality the liability of an indorser, the municipality is not bound as an indorser and warrantor of the genuineness of the signatures (as of town selectmen, which were forged) preceding the indorsement by virtue of the negotiable instruments law or the law merchant, or even by a custom making notes payable to the treasurer.⁸

III. POWER TO INCUR INDEBTEDNESS AND MAKE EXPENDITURES.

§ 2164. General rules.

Indebtedness incurred by the municipality and expenditures made must be for an authorized purpose.⁹

If no express power exists it must arise from necessary implication and unless the municipality may be fairly implied to have the power to make the expendi-

⁶ Capital Savings Bank & Trust Co. v. Framingham, 246 Fed. (C. C. A.) 553.

⁷ Capital Savings Bank & Trust Co. v. Framingham, 246 Fed. 553, 559, 560 (distinguishing Citizens' Savings Bank v. Newburyport, 169 Fed. 766, 95 C. C. A. 232); Brown v. Newburyport, 209 Mass. 259, 95 N. E. 504, Ann. Cas. 1912B,

495; Franklin Savings Bank v. Framingham, 212 Mass. 92, 98 N. E. 925.

⁸ Capital Savings Bank & Trust Co. v. Framingham, 246 Fed. 553, 560; Franklin Savings Bank v. Framingham, 212 Mass. 92, 95, 98 N. E. 925.

⁹ State ex rel. v. Muskogee (Okla.), 172 Pac. 796.

ture involved for the purpose and in the mode adopted, the power will be denied.¹⁰

Thus where the law requires the expense of planting shade trees in the streets to be paid for by property owners, the municipality is without power to incur expense therefor to be paid out of the public revenue.¹¹

The conditions precedent to incurring indebtedness and making expenditures are rigidly enforced. Debt limit provisions cannot be ignored, either directly or indirectly. Where the consent of a prescribed number of the electors of the municipality, and also provision for its payment, is required, this mode of incurring the indebtedness and making the expenditure, becomes the measure of the power of the municipality. In such case the power to create the debt does not abide with the municipal authorities alone, but with the consent of the requisite number of electors.¹²

§ 2166. Must be for municipal purpose—power of the legislature.¹³

¹⁰ Cannot expend public funds raised by taxation to defeat proposed legislation affecting the municipality. *State ex rel. v. Superior Court*, 93 Wash. 267, 160 Pac. 755.

¹¹ *New Butler v. Tucker* (Okl.), 153 Pac. 628, approving *Re Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978, to the effect that one dealing with a municipality is bound to know the limitations on its powers as to contracting, etc.

¹² *Santa Cruz v. Wykes*, 202 Fed. 357, 364, 120 C. C. A. 485, affirming 184 Fed. 752.

Constitutional amendment may validate indebtedness in excess of the limit, or make exceptions as to incurring debts, etc. *Lucas v. Florence*, 103 S. C. 169, 87 S. E. 996.

A law providing that the indebtedness shall not exceed in any one year the income and revenue provided for such year without an affirmative vote of two-thirds of the qualified electors, held not applicable to expense of publication of a freeholders charter. *Arthur v. Petaluma*, 27 Cal. App. 782, 151 Pac. 183, 186.

Under the provision forbidding incurring indebtedness except for necessary expenses, unless by a vote of the electors, etc., held school building was not a necessary expense. *Stephens Co. v. Charlotte*, 172 N. C. 564, 90 S. E. 588.

¹³ *People ex rel. v. Bradley*, 207 N. Y. 592, 101 N. E. 766, affirming 139 N. Y. S. 1139, 155 App. Div. 882.

"The legislative power over mu-

§ 2167. Same—illustrations of what are and what are not public purposes.

Lighting streets, parks, public places and buildings;¹⁴ watering or sprinkling public way;¹⁵ supplying water to the municipality and its inhabitants;¹⁶ construction

nicipal corporations is large and ordinarily its determination of what is a public purpose for taxation, or the appropriation of money, is uncontrollable by courts. But where the legislature clearly devotes public funds to an object in no sense public, the judiciary may, and should, declare its action invalid." *Wolcott v. Wilmington* (Del. Ch.), 95 Atl. 303, 305.

Power conferred by the legislature to establish and maintain, within the corporate limits a permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants was held to be a public purpose. *Laughlin v. Portland*, 113 Me. 486, 90 Atl. 318.

Pensions. "The authority to grant pensions to public employees who shall have become incapacitated after long service is upheld as a power incident to government itself. As such, this power to declare resides in Congress, although not expressly conferred by the federal constitution. (*United States v. Hall*, 98 U. S. 343, 346, 25 L. ed. 180), and is unquestionably open to exercise by the state, through the legislature, as an attribute of sovereignty, unless prohibited by the state constitution." It is not a "gift" or "extra compensation to a public servant," forbidden by the constitution. It is a "public purpose," and as af-

fecting a municipality, "a city purpose" within the definition of these terms as judicially adopted. *Hammitt v. Gaynor*, 144 N. Y. S. 123, 125, 126.

Provision for pension fund for employees in long service, held valid and a public use. *Hughes v. Traeger*, 246 Ill. 612, 106 N. E. 431, 433.

Tuberculosis hospital donation. *Le Bourgeois v. New Orleans* (La. 1919), 82 So. 268.

¹⁴ *Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393, citing § 1783, vol. 4 ante.

Electric light plant for lighting the streets, etc., is a public utility and a municipal purpose. *Colorado Springs v. Pikes Peak Hydro-Electric Co.*, 57 Colo. 169, 140 Pac. 921.

When a city operates a public utility in serving its inhabitants it acts in its proprietary capacity and stands in like manner as a private corporation or an individual. *Mulligan v. Miles City*, 51 Mont. 405, 153 Pac. 276, citing § 1801, vol. 4, ante.

¹⁵ *Temple v. Corbell*, 17 Ariz. 1, 147 Pac. 745.

¹⁶ A municipal corporation owning its own plant was held to have power to contract for water in quantities and furnish it to its inhabitants, since this is a municipal purpose. *Marin Water & Power Co. v. Sausalito*, 168 Cal. 387, 143 Pac. 767.

Creating and operating water-

of a subway under ample power;¹⁷ expenses of a bond issue;¹⁸ expenses for printing ballots for a municipal election;¹⁹ expenditure for an election to vote to build a railroad from the city to a point beyond;²⁰ and necessary expenses in providing for public improvements, or public utilities,²¹ have been held to be public or municipal purposes. Expenses for digging a ditch to carry the accumulation of surface water out of the town, the ditch being partly within and partly without the municipality, are "strictly town or municipal purposes" within the meaning of the constitution of Washington.²²

Payments to officers of the city for service or for use of property, as rental, under laws forbidding the letting of contracts to such officers, are unauthorized.²³ So expenses for the maintenance of a private institution, as a museum of arts, is not the use of public funds for a public purpose.²⁴

Nor is it a corporate purpose for the city to pay for

works for the purpose of protecting against fire, flushing sewers or other uses pertaining to the public health and safety, is a governmental function. But in supplying water for the use of the inhabitants for domestic and commercial purposes is private, although it is carried on for public advantage, is public in its nature and is impressed with a public use. *Eastern Illinois State Normal Schools v. Charleston*, 271 Ill. 602, 111 N. E. 573.

¹⁷ *Admiralty Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241.

¹⁸ *Miller v. Park City*, 126 Tenn. 427, 150 S. W. 90.

¹⁹ *Fahey v. Bloomington*, 268 Ill. 386, 109 N. E. 292.

²⁰ "That the construction of a railroad by the state or by a municipality is public purpose seems to be settled by the reasoning of

the court in *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. ed. 382. The reasoning in that case would seem to cover all cases of railroad construction by municipalities, whether wholly within the boundaries of such municipality or not, if the purpose of such improvement is for the general welfare, convenience, health or comfort of its citizens." *Churchill v. Grants Pass*, 70 Or. 283, 141 Pac. 164, 166.

²¹ "Necessary expenses" include providing for public utilities, when authorized, public improvements, etc. *Asbury v. Albemarle*, 162 N. C. 247, 78 S. E. 146.

²² *Re Wooley*, 75 Wash. 206, 134 Pac. 825.

²³ *Osburn v. Stone*, 176 Cal. 480, 150 Pac. 367.

²⁴ *Burton v. Detroit*, 190 Mich. 195, 156 N. W. 453, 458.

the construction of sidewalks when the cost of constructing the same has been provided for by special taxation or special assessment. When the cost thereof is so provided the municipality in no wise becomes indebted for such improvements. Thus it is without power to advance money for such work and reimburse itself from the moneys procured from the landowners when paid.²⁵

And the appropriation of public fund to reimburse an officer for the payment of costs and attorney fees incurred by him in defending against a claim unlawfully paid to and appropriated by him out of the town's funds is unlawful. Here the officer worked as a laborer for the city while he was in office where the law prohibited an officer from being interested directly or indirectly in any service to be performed for the city. He incurred the expense sought to be appropriated in defending against paying him the money which he earned as such laborer.²⁶

A historical pageant conducted with the object of educating the citizens in the history of the city and for the encouragement of the spirit of local pride and patriotism, was held not a municipal enterprise and public purpose, although there appeared no element of gain.²⁷

²⁵ *Midland Lumber Co. v. Dallas City*, 276 Ill. 172, 114 N. E. 580, following *Chicago v. Brede*, 218 Ill. 528, 75 N. E. 1044.

²⁶ "The town council, while clothed with some discretionary powers in the matter of incurring expense on behalf of its officers who, while acting lawfully and in good faith and in the interest of the corporation, incur some liability, such discretion cannot be carried to the extent of permitting the use of the funds of the corporation to pay costs and attorney fees incurred by a former officer in an attempt to retain a sum of money unlawfully obtained by him

from such corporation while an officer thereof. The discretionary powers of such officers, if permitted to be exercised in the manner would wholly circumvent and defeat the purpose of the statute, and instead of protecting the corporation against the unlawful appropriation of its sums, would allow the expenditure of many times the amount unlawfully appropriated in aiding the party it sought to retain the same." *Peet v. Leinbaugh*, 180 Iowa 937, 164 N. W. 127.

²⁷ Some of the citizens paid for the privilege of witnessing the enterprise and others were admitted

Expenses for salary or wages for workmen employed in operating a public ferry across a river outside of the corporate limits, although on a public highway leading to the town are not authorized. The object was commercial. No municipal purpose was or could be served. Added trade might result but stimulation of trade has never been held to be either a governmental or municipal function of cities and towns. Moreover, the power to operate ferries is in the state, and does not belong to municipalities unless granted. "It is a fundamental of the law of municipal corporation that, in the absence of express grant of power or an implication of power arising ex necessitate, a city or town cannot extend its authority or jurisdiction over any subject-matter beyond the town limits."²⁸

A municipality having power to let for profit real estate held for public purposes and not needed for the present for such a purpose,—as leasing such property on reasonable terms and receiving the rents—it may incur needed minor expenses, that is, expenses within reasonable limits, to make the property rentable, such for instance as for a new key, a new blind, or new steps in case of a building, or for suitable ways in the case of

without cost. The vast body of citizens received no benefit whatever. An ordinance appropriating an amount to pay a deficit was declared invalid. "If the municipality by appropriated ordinance had provided for this entertainment, and the expense had been incurred, then a moral obligation to pay might have existed sufficient to sustain the ordinance, even though it could be argued that the function was not municipal in character, but the corporation that was formed conducted the enterprise without official sanction of the councils of Philadelphia. Had

the receipts for the sale of seats and from other contributions been sufficient to discharge the obligations, the affair would not have been a municipal affair in any sense. Unfortunately there was a deficit. The appropriation under these circumstances cannot be sustained upon the ground of moral obligation." *Historical Pageant Assn. v. Philadelphia*, 260 Pa. 447, 103 Atl. 824.

²⁸ *Re Woolley*, 75 Wash. 206, 134 Pac. 825, 827, relying on *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. Rep. 836.

vacant land, either by leveling the land or making plank walks.²⁹

§ 2168. Same—moral claims.

If no moral obligation exists to make the payment an ordinance appropriating money to pay the claim of a contractor for extra work is void. Thus where the contractor had been fully paid for all the work called for by the contract, and had done nothing additional, there was no moral obligation resting upon the city to pay him more.³⁰

So there is no moral obligation resting upon the city to pay extra compensation to its officers, and usually statutes authorizing such payments are without legal force.³¹

§ 2170. Same—aid to private corporations or associations.³²

A corporation created under a general law for the management of a public library supported by taxation is

²⁹ Davis v. Rockport, 213 Mass. 279, 100 N. E. 612, 614, L. R. A. (N. S.) 1139.

³⁰ Longstreth v. Philadelphia, 245 Pa. 233, 91 Atl. 667.

³¹ Statute authorized the city to pay members of an assessment board extra compensation. "There is no moral claim of members of the board for extra compensation. It was the duty of the members of the board to perform all the extra duties imposed upon them as such officials by the act and they were not entitled to be paid extra compensation for the extra services. How, then, could a moral obligation to pay for the extra services arise? * * * Therefore, the payment of any greater salary than that fixed by law is a gratuity

and a gift. Being clearly a gratuity it was not given for a public purpose, and the legislature cannot make it such, and if it is clearly for an unauthorized purpose the court should declare it invalid, even in the absence of a constitutional prohibition." Wolcott v. Wilmington (Del. Ch.), 95 Atl. 303, 305.

³² Lord v. Denver, 58 Colo. 1, 143 Pac. 284; Spangler v. Mitchell, 35 S. D. 335, 152 N. W. 339; § 359A, ante.

School district is a "municipal corporation" and cannot become a member of a mutual fire insurance company. School District v. Twin Falls County Mut. F. I. Co., 30 Idaho 400, 164 Pac. 1174.

Requiring witness fees paid to

in no sense a private corporation; it is a public institution existing at the will of the legislature. Hence, a municipality may appropriate money for such library.³³

The issuance of improvement bonds to pay for local improvements was held not a pledge of the credit of the municipality to benefit abutting property owners.³⁴

"The city has no power, in the absence of legislative authority, to appropriate money in aid of railroad building. * * * And the city has no power to aid a railroad company in the performance of the duties and obligations which the construction and maintenance of its road imposes. A contract to do so is both ultra vires and without consideration. The rights here concerned are rights of the public which the officers of the city cannot barter away. * * * A contract by which a municipality undertakes to assume an obligation properly resting on the railroad company, to restore a road or street, to build a bridge, or to maintain a bridge is wholly beyond the power of the city and it is void."³⁵

policeman to be given to a voluntary association of policemen to create a fund to aid sick and disabled members, and to assist families of members, which benefits do not extend to all policemen of the force, but are restricted to the members of the association and their families, held not a public purpose, but private. *State ex rel. v. Kimmel*, 256 Mo. 611, 165 S. W. 1067.

³³ *Lambert v. Board of Trustees*, 151 Ky. 725, 152 S. W. 802.

³⁴ Improvement of streets within its borders is a proper corporate purpose, and with legislative authority any municipality may issue its bonds for such purpose although the improvement of a particular street may confer a peculiar benefit upon the property owners along the street—so peculiar,

indeed, as to justify a special assessment upon them—the improvement is none the less a public improvement. In this case the expenditure is to be made on the city's own easement, its streets, of which it had, and retains control and of which all its citizens have the benefit. The use of the credit of the city for such work is for a legitimate corporate purpose, notwithstanding the fact that some property owner will be specially benefited. *Imboden v. Bristol*, 132 Tenn. 562, 179 S. W. 147.

³⁵ *Minneapolis, etc., Electric Traction Co. v. Minneapolis*, 124 Minn. 351, 145 N. W. 609.

May subscribe to stock of railroads in Massachusetts. *Re Opinion of the Justices (Mass. 1919)*, 122 N. E. 763.

A municipal contract with one for the lease or sale of a railroad to be constructed by the city when completed was held not to violate the constitutional provision forbidding a city from becoming a stockholder in any corporation, etc.³⁶

The operation jointly by a city and a corporation of a subway or street railway, was held to violate the constitutional inhibition.³⁷

§ 2171. Same—constitutional prohibitions against donations.³⁸

The constitutional limitation does not apply, it has been held, to a city giving or lending credit to the state; so a city, by legislative authority, may acquire land within its limits for the purposes of a public park and convey it to the state, on the condition that the state shall construct, etc., public buildings thereon at a cost of not less than a sum named and shall always maintain the land not covered by buildings as a park for the use of the public.³⁹

³⁶ "The proposed road has no capital stock, and therefore, the city cannot be and does not propose to become a stockholder. It is not being constructed by any private corporation, company or association, and therefore, the city cannot and does not propose to aid any such organization or loan its credit to it. The proposition is to build and own a road for the purpose of its citizens. That it may when built lease or sell it does not alter the fact that primarily it is a public improvement for a public purpose." The court called attention to the constitution of other states, as e. g. New York, which contains the additional clause that: "Nor shall any such city, etc., be allowed to incur any indebtedness except for municipal,

etc., purposes." The Oregon constitution was adopted later and copied almost verbatim from this provision of the New York constitution, and it omitted the clause just quoted. The court observed: "This omission is significant as indicating an intention to leave the authority of the municipalities of this state to contract indebtedness somewhat broader than that of states having the latter clause in their organic charters." *Churchill v. Grants Pass*, 70 Ore. 283, 141 Pac. 164, 166.

³⁷ *State ex rel. v. Cincinnati Street Ry. Co.*, 97 Ohio 283, 119 N. E. 735, 740-743.

³⁸ *Lord v. Denver*, 58 Colo. 1, 143 Pac. 284.

³⁹ *Sacramento v. Adams*, 171 Cal. 458, 153 Pac. 908.

Payment of sums of money to the representatives of volunteer firemen who are killed or die from injuries received in the discharge of their duties is in the nature of insurance—a part of the compensation agreed to be paid, and therefore is not a giving of public funds for private purposes within the constitution, etc.⁴⁰

Expenses and counsel fees incurred to test the right of removal from a municipal office may be repaid by the municipality under a law empowering a city to pay claims “equitable payable” by the city, although not constituting legal obligations. It does not infringe the constitutional provision forbidding a city giving money or property to aid an individual, nor incur indebtedness except for municipal purposes.⁴¹

A statute empowering a city to pay extra compensation to officers of an assessment board was held to be an appropriation of funds to individuals and therefore, against the constitution.⁴²

§ 2172. Conditions precedent and procedure.⁴³

§ 2173. Necessity for first making provision for payment of debt.⁴⁴

⁴⁰ *Hammond v. Fulton*, 220 N. Y. 337, 115 N. E. 998, Ann. Cas. 1917C, 1137, reversing 163 N. Y. S. 51.

⁴¹ *Re Christey*, 155 N. Y. S. 39, 92 Misc. Rep. 1.

Rule applied to reimbursing a police officer for expenses in defending himself for assault in using unnecessary force in making an arrest. *Mollnow v. Rafter*, 89 N. Y. Misc. Rep. 498.

Reimbursing officers for expenses sustained as constitutional. *Kane v. McClellan*, 110 N. Y. App. Div. 44.

⁴² *Wolcott v. Wilmington* (Del. Ch.), 95 Atl. 303, 306, 307.

⁴³ Mere irregularities, and violation of directory requirement, as in designating a newspaper in which municipal publication should be made, do not invalidate, etc. *Fagen v. Hoboken*, 84 N. J. L. 226, 86 Atl. 1025.

⁴⁴ *Southern Bitulithic Co. v. Detreville*, 156 Ky. 513, 161 S. W. 560; *Fowler v. Oakdale*, 158 Ky. 603, 166 S. W. 195, 198; *Enterprise Real Estate Co. v. Charleston*, 107 S. C. 492, 96 S. E. 184.

“There can be no dispute but that the municipalities of the state are prohibited from contracting debts without having made provision for their payment.” In-

§ 2175. Certificate that funds are applicable or indebtedness lawful.

The officer certifies to the fact respecting the sufficiency of available funds as it exists when the certificate is made. The duty to certify, being expressly imposed by law, is ministerial and may be compelled by mandamus.⁴⁵

§ 2176. Effect of unauthorized debts or expenditures.

One who deals with a municipality is bound by the limitations on its powers,⁴⁶ and is chargeable with knowledge thereof.⁴⁷

The rules are familiar that (1) when the money of a municipality has been paid out on a contract or for an indebtedness which the municipality had no authority to make or incur, it may be recovered,⁴⁸ and that (2) where public funds have been unlawfully diverted and can be traced into the property of an insolvent estate they may be reclaimed as a trust fund by the municipality which is the rightful owner, before any distribution is made to the general creditors of the insolvent.⁴⁹

junction will lie to prevent. *Dunham v. Slidell*, 133 La. 212, 62 So. 635.

When the consent of the requisite number of electors is given provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness annually, and to create a sinking fund sufficient to discharge the principal within twenty years. *Santa Cruz v. Wykes*, 202 Fed. 357, 364, 120 C. C. A. 485, affirming 184 Fed. 752.

See § 2291, post; § 2174, vol. 5, ante.

⁴⁵ *People ex rel. v. Prendergast*, 163 N. Y. S. 583, 99 Misc. Rep. 8, affirmed 163 N. Y. S. 1128.

⁴⁶ *New Butler v. Tucker* (Okla.), 153 Pac. 628.

⁴⁷ *Higginson v. Fall River*, 226 Mass. 423, 115 N. E. 764; *George S. Chatfield Co. v. Waterbury*, 88 Conn. 322, 91 Atl. 436.

Those handling warrants issued in excess of the debt limit are chargeable with constructive notice thereof. *Rankin v. Chariton*, 160 Iowa 265, 141 N. W. 424.

See § 1166, ante; § 1166, vol. 3, ante; § 2239, post; § 2239, vol. 5, ante.

⁴⁸ *Re Manistee Watch Co.*, 197 Fed. 455, 457; *State ex rel. v. Seattle*, 74 Wash. 438, 133 Pac. 1005; *Pacific County v. Willapa Harbor Pub. Co.*, 88 Wash. 562, 153 Pac. 360; *Milwaukee v. Binner*, 158 Wis. 529, 149 N. W. 211.

⁴⁹ *Re Manistee Watch Co.*, 197 Fed. 455, 457.

Overpayments are not necessarily illegal in the sense that such acts are *ultra vires*. Such amounts are not always recoverable as wrongful payments on the theory that municipal officers who pay out funds illegally are personally liable with those who receive the moneys. Such payments are distinguishable from those made without authority or in violation of law.⁵⁰

IV. COLLECTION AND DISTRIBUTION OF FUNDS.

§ 2178. Estimates of probable expenditures.⁵¹

§ 2179. General and special funds.⁵²

All lawful obligations of a municipality are payable from its general funds unless the law specifically provides otherwise. Thus when a municipality is given power to purchase property for some specific purpose it necessarily follows that the purchase price of such property becomes a charge upon the general fund, in the absence of some special provision calling for payment from some other fund.⁵³

When a municipal corporation by authority of law creates a particular fund with reference to which it contracts, any indebtedness arising on such contract is payable therefrom only. Where, however, the so-called fund is created by the city for its own convenience and not by direction of law, it is not payable from such specified fund, but is a general liability, payable out of the general funds of the city, chargeable, perhaps, to a specified account.⁵⁴

⁵⁰ *Tacoma v. Leighton*, 88 Wash. 606, 153 Pac. 363.

⁵¹ *McEvoy v. Baltimore*, 125 Md. 111, 94 Atl. 543; *Zittel v. Fuhrmann*, 166 N. Y. S. 696, 101 Misc. Rep. 109; *People ex rel. v. Nowak*, 163 N. Y. S. 374, 379, 99 Misc. Rep. 111.

⁵² *Special fund for public utility*. *Washington-Oregon Corporation v. Chehalis*, 76 Wash. 442, 136 Pac.

681; *Uhler v. Olympia*, 87 Wash. 1, 152 Pac. 998, 151 Pac. 117.

Park fund exempt from city control. *Baltimore v. Williams*, 124 Md. 502, 92 Atl. 1066.

⁵³ *State ex rel. v. Irwin*, 74 Wash. 589, 134 Pac. 484.

⁵⁴ *Ott Hardware Co. v. Holmberg*, 32 Cal. App. 229, 162 Pac. 911, 913. See § 1950, vol. 4, ante.

§ 2181. Custody of funds.⁵⁵

A town or city treasurer has only power to endorse a check made payable to the municipality for deposit for collection to the account of the municipality. Such officer cannot endorse it for circulation.⁵⁶

But it has been held that, it is within the power of such officer to endorse to a bank at which a note of the municipality is made payable a certified check made payable to the municipality, in order to provide the bank with funds necessary to pay the note, although such officer in executing the note and in obtaining the check involved acted fraudulently, where the other parties to the transaction acted in good faith on the supposition that the treasurer was acting honestly.⁵⁷

§ 2182. Adjustment of accounts with state or county.⁵⁸**§ 2184. Transfer of moneys from one fund to another.⁵⁹****§ 2185. Payment of debts.⁶⁰**

Where the law specifically provides that all demands against the municipality shall be paid by warrants which

⁵⁵ *Zittel v. Buck*, 170 N. Y. S. 806, 183 App. Div. 448.

Designation of depository. *Babcock v. Rocky Ford*, 25 Colo. App. 312, 137 Pac. 899; *State ex rel. v. Wilson*, 151 Mo. App. 723, 132 S. W. 625.

⁵⁶ *Franklin Savings Bank v. International Trust Co.*, 215 Mass. 231, 102 N. E. 363; *Capital Savings Bank & Trust Co. v. Framingham*, 246 Fed. 553, 560, 561.

⁵⁷ *Brown v. First National Bank*, 216 Mass. 298, 103 N. E. 780, 782, stating that the validity of the endorsement depends upon the extent of the treasurer's apparent authority.

⁵⁸ *Fargo v. Cass County*, 35 N. D. 372, 160 N. W. 76.

⁵⁹ *State Bank v. Miami*, 43 Okla. 809, 144 Pac. 597; *Ford v. Bayonne*, 84 N. J. Eq. 199, 93 Atl. 591.

⁶⁰ *Ward v. Du Quoin*, 173 Ill. 515.

Expense of mayor in attending to legislation affecting the city. *Meehan v. Parsons*, 271 Ill. 546, 111 N. E. 529, reversing 194 Ill. 131.

Workmen's Compensation Act; premiums due the accident fund provided for in the act upon the pay rolls of the various contractors performing public work for the city between named dates, where

shall specify the purpose for which they are drawn, it is illegal for the city treasurer to pay claims in cash; nor under such restrictive law can the city council authorize payment in cash or ratify the wrongful act of the treasurer in so doing.⁶¹

§ 2186. Effect of insufficient funds.⁶²

Money raised and appropriated by a municipal corporation for a specific purpose is regarded as being in the treasury applicable to the payment of the debt incurred, and this is so, although the money has been diverted to other purposes.⁶³

If the law does not forbid, a warrant may be issued upon the general fund for a lawful obligation, although there is not sufficient money in such fund to pay it.⁶⁴

“The failure of funds appropriated will not defeat an action for an otherwise properly incurred liability.”⁶⁵

the city had retained from the payments due the contractors sums sufficient to satisfy these premiums. *State ex rel. v. Seattle*, 73 Wash. 396, 132 Pac. 45.

⁶¹ *Hillyard v. Carabin*, 96 Wash. 366, 165 Pac. 381, 383.

⁶² Current revenue to pay obligations of a preceding year. *State Bank v. Miami*, 43 Okla. 809, 144 Pac. 597.

Want of funds as a defense to mandamus to compel payment. *People ex rel. v. Nowak*, 163 N. Y. S. 374, 379, 99 Misc. Rep. 111.

On application for mandamus to compel payment of claims, absence of funds in the treasury to meet them will not prevent the writ. *McEvers v. Boyle*, 25 Cal. App. 476, 144 Pac. 308.

⁶³ *American Metal Ceiling Co. v. New Hyde Park Fire Dist.*, 154 N. Y. S. 661, 91 Misc. Rep. 236.

Money misapplied is viewed as in

the treasury, in determining question of limitation of indebtedness. *State Bank v. Miami*, 43 Okla. 809, 144 Pac. 597.

Merging funds set aside to pay salaries and expenses of officers with the general funds; presumed pending litigation to have remained as set aside, and it is available therefor, for this purpose when the litigation is at an end. *Scott v. Boyle*, 25 Cal. App. 806, 144 Pac. 308; *McEvers v. Boyle*, 25 Cal. App. 476, 144 Pac. 311.

⁶⁴ *State ex rel. v. Irwin*, 74 Wash. 589, 134 Pac. 484.

⁶⁵ Special services rendered by an attorney in prosecuting a case in behalf of the people of the city, charging violation of the criminal laws of the state. Want of authority to employ was urged. *Mosher v. Elmira*, 145 N. Y. S. 964, 83 Misc. Rep. 328.

§ 2186a. Preference of municipality.

A municipality having funds in a bank which becomes insolvent is not entitled to preference in the payment of the moneys on deposit to its credit at the time the bank was taken charge of by a public officer for the purpose of liquidation.⁶⁶

V. APPROPRIATIONS.

§ 2187. Definition, classification and power to make.⁶⁷**§ 2188. Necessity for.**

Laws usually forbid the incurring of any expense unless an appropriation has been previously made to cover such expense.⁶⁸

⁶⁶ Re Northern Bank of New York, 216 N. Y. 608, 106 N. E. 749, affirming 148 N. Y. S. 70, 163 App. Div. 974, 85 Misc. Rep. 594.

⁶⁷ Only for public purposes. *Duffy v. Burrill* (Mass. 1920), 125 N. E. 135.

Board of estimate and apportionment under charter of Greater New York may refuse to make appropriation for unnecessary employees and such power is continuous. *People ex rel. v. Prendergast*, 219 N. Y. 252, 114 N. E. 433, reversing 160 N. Y. S. 590, 173 App. Div. 618.

Power to transfer any appropriation of board of estimate and apportionment under charter of New York City. *People ex rel. v. Dooley*, 155 N. Y. S. 326, 169 App. Div. 423.

Defective appropriation, as failure to make a separate, specific appropriation for outstanding warrant indebtedness. *Standrod v. Case*, 24 Idaho 365, 133 Pac. 651.

An appropriation to pay a bill for work set aside because not passed after an examination and consideration by the council of what the work was fairly worth. *Armitage v. Essex Const. Co.*, 87 N. J. L. 134, 94 Atl. 51.

Appropriation, held valid though not based upon an estimate by the proper municipal authorities where afterwards such estimate was made. *Bond v. Baltimore*, 118 Md. 159, 84 Atl. 258.

⁶⁸ It should be made prior to the acceptance of bids and the awarding of the contract for work, but not before bids are submitted. If the appropriation is less than the lowest bid, the action on the bids may be delayed and an additional appropriation made. *People ex rel. v. Prendergast*, 163 N. Y. S. 583, 99 Misc. Rep. 8, affirmed 163 N. Y. S. 1128.

Law required. *United States Drainage & Irrigation Co. v. Medford*, 225 Mass. 467, 114 N. E. 734;

“Without an appropriation there can be no payment of salaries. This is too well settled to admit of argument.”⁶⁹

And many laws provide that no expenditures shall be made and no liability shall be incurred or be binding on the city for any purpose beyond the appropriation previously made therefor. Such requirement is mandatory and precludes additional appropriations.⁷⁰

Where the funds to pay an obligation have been provided, but diverted to other public purposes, it has been held that the municipality may make a second provision therefor.⁷¹

§ 2189. Annual appropriations.

Where laws limit the time of making the annual appropriation, and forbid making further appropriations during the fiscal year, any further appropriation than the annual is unauthorized and void.⁷²

Zittel v. Fuhrmann, 166 N. Y. S. 696, 101 Misc. Rep. 109.

Failure to make an appropriation to cover the expenses of an election for a bond issue, does not invalidate the election and bonds. *Kansas City v. Woerishoeffer*, 249 Mo. 1, 155 S. W. 779, 784.

⁶⁹ *Thiel v. Philadelphia*, 245 Pa. 406, 91 Atl. 490.

⁷⁰ *Shannon v. Cambridge*, 231 Mass. 322, 121 N. E. 31.

Expenditures limited to appropriations. *Vermeule v. Corning*, 174 N. Y. S. 220.

No expense to be incurred exceeding the sums appropriated. *Spencer v. New York*, 166 N. Y. S. 177, 179 App. Div. 69.

Garbage contract, held valid although the first annual appropriation therefor was insufficient for the entire period of the contract. *Carke v. Fall River*, 219 Mass. 580, 107 N. E. 419.

⁷¹ *State ex rel. v. Philippi*, 80 W. Va. 437, 92 S. E. 725, disapproving in part *Welty v. County Court*, 46 W. Va. 460, 33 S. E. 269.

⁷² *People ex rel. v. Sergel*, 269 Ill. 619, 110 N. E. 124, 126.

Requirement, held mandatory for the protection of the taxpayers. *People ex rel. v. Sergel*, 269 Ill. 619, 110 N. E. 124, 126; *People v. Read*, 261 Ill. 502, 104 N. E. 202.

Must be passed within the first quarter of the fiscal year, otherwise it is void. *Midland Lumber Co. v. Dallas City*, 276 Ill. 172, 114 N. E. 580; *People ex rel. v. Chicago & Alton R. Co.*, 257 Ill. 208, 100 N. E. 502.

Expenses and salaries of assistants must be made in the annual budget. *People ex rel. v. Prendergast*, 156 N. Y. S. 1098.

§ 2190. Ordinance, passage and contents.⁷³

The appropriation ordinance must be definite and certain in its terms and amounts.⁷⁴

It must specify the purpose or object in each instance for which the appropriation is made, with the precise sum for each.⁷⁵

§ 2191. Effect of appropriations.

An appropriation of public moneys for one object can be used solely for that object.⁷⁶

The general rule is that appropriations of municipal funds, whether general or specific, for a given object or a definite purpose can not be diverted to any other purpose, and laws often expressly declare this rule, in substance, that any appropriation, regular or special, made for any specific purpose shall not be expended for any other purpose; but if so expended, it shall be covered back into the treasury thirty days after the expiration of the fiscal year for which made.⁷⁷

The fact that an appropriation has been made for "current expenses" of a department, does not authorize unwarranted expenditures, as the expenses and fees of an attorney, because clearly such expenses are limited to lawful obligations, and hence an unexpended balance of such appropriation cannot be applied in whole or in part to demands which the municipality is under no legal liability to pay.⁷⁸

§ 2192. Mandamus to compel appropriations.⁷⁹

⁷³ *Midland Lumber Co. v. Dallas City*, 276 Ill. 172, 114 N. E. 580.

⁷⁴ *People v. Chicago, B. & Q. R. Co.*, 282 Ill. 206, 118 N. E. 439.

⁷⁵ *Standrod v. Case*, 24 Idaho 365, 133 Pac. 651, 653.

⁷⁶ *Appeal of Dellaripa*, 88 Conn. 565, 92 Atl. 116.

E. g. expert assistance in making up a tax roll, limited to such work. *Milwaukee v. Binner*, 158 Wis. 529, 149 N. W. 211.

Excessive appropriation, disposal of excess. *Schneider Granite Co.*

v. Gast Realty & Inv. Co., 259 Mo. 153, 168 S. W. 687.

⁷⁷ *George S. Chatfield Co. v. Waterbury*, 88 Conn. 322, 91 Atl. 436.

Appropriation not limited as to time, held available for the year following for specific purpose named. *Brownsville v. Kinder* (Tex. Civ. App.), 204 S. W. 446.

⁷⁸ *Higginson v. Fall River*, 226 Mass. 423, 115 N. E. 764.

⁷⁹ *People ex rel. v. Turnbull*, 184 Ill. App. 151.

CHAPTER 40.

ELECTIONS AS TO INCURRING OF INDEBTEDNESS OR ISSUANCE OF BONDS.

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| § 2194. Authority to hold elections. | § 2200. Same—counting the votes,
return and record. |
| § 2195. Necessity for election. | |
| § 2196. How question submitted. | § 2201. Number of votes necessary. |
| § 2197. Notice of election. | § 2202. Effect of irregularities and
attack on validity of elec-
tion. |
| § 2198. Form and scope of question
or questions submitted. | |
| § 2199. Conduct and time of elec-
tion. | § 2203. Effect of favorable vote. |
| | § 2204. Successive elections. |

§ 2194. Authority to hold elections.¹

The power of the legislature as to elections is unlimited unless restricted by the constitution. Hence, a charter amendments relating to elections to incur indebtedness for specific purposes which attempts to ignore the state authority and assume sovereign rights, of course, is ultra vires and void.²

§ 2195. Necessity for election.

Elections to incur indebtedness or to make expenditures are necessary only when so required by the applicable law, whether found in constitution, statute or charter.³

¹ Law applicable for bond issue to be followed. *Schuck v. Stone Harbor Borough*, 87 N. J. L. 484, 95 Atl. 133.

² *Riggs v. Grants Pass*, 66 Ore. 266, 134 Pac. 776.

³ *Twichell v. Seattle* (Wash. 1919), 179 Pac. 127; *State ex rel. v. Orear* (Mo. 1919), 210 S. W. 392; *O'Connor v. Waterford*, 156 N. Y. S. 933, 171 App. Div. 425.

Election required only where the

proposed indebtedness is within the statutory or constitutional prohibition. *Ashland Waterworks Co. v. Ashland*, 251 Fed. (C. C. A.) 492, 498, vacating 230 Fed. 254.

Question of bond issue need not be submitted to a vote of the people unless the law so requires. *Robinson v. Goldsboro*, 161 N. C. 668, 77 S. E. 948; *Bain v. Goldsboro*, 164 N. C. 102, 80 S. E. 256.

Consent of a specified number of the qualified electors of the municipality, expressed at an election held for the purpose, is frequently required to incur an indebtedness,⁴ (except for specified purposes)⁵ or to incur an indebtedness in excess of the legal limit,⁶ for example, in excess of the revenue and income for the year,⁷ or for authority to issue bonds,⁸ or for authority to ac-

⁴ *Walters v. Orth* (Okla.), 158 Pac. 352; *McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99.

To create a debt authorized by constitution only on vote of people. *Sanders v. Gainesville*, 141 Ga. 441, 81 S. E. 215.

A demand note given by the municipality to cover costs of lighting secured by the city, held not in violation of the constitution. *Hogansville v. Planters' Bank*, 147 Ga. 346, 94 S. E. 310.

⁵ *Renfroe v. Atlanta*, 140 Ga. 81, 78 S. E. 449, 45 L. R. A. (N. S.) 1173.

Contract where prohibited except for necessary expenses, unless by vote, etc., held public school building is not a necessary expense. *Stephens Co. v. Charlotte*, 172 N. C. 564, 90 S. E. 588.

⁶ *Southern Bitulithic Co. v. De-treville*, 166 Ky. 513, 161 S. W. 560.

⁷ *Santa Cruz v. Wykes*, 202 Fed. 357, 120 C. C. A. 485, affirming 184 Fed. 752; *Marion v. Haynes*, 157 Ky. 687, 164 S. W. 79; *Flanders v. Board of Trustees, etc.*, 170 Ky. 627, 186 S. W. 506; *Schuster v. Oakdale* (Ky.), 203 S. W. 715; *State ex rel. v. Gordon* 251 Mo. 303, 158 S. W. 683.

A law providing that the indebtedness shall not exceed in any one year the income and revenue provided for such year without an

affirmative vote of two-thirds of the qualified electors, held not applicable to expense of publication of a freeholder's charter. *Arthur v. Petaluma*, 27 Cal. App. 782, 151 Pac. 183, 186.

⁸ *California. Inglewood v. Kew*, 21 Cal. App. 611, 132 Pac. 780; *Hartigan v. Los Angeles*, 170 Cal. 313, 149 Pac. 590; *Oxnard v. Bel-lah*, 21 Cal. App. 33, 130 Pac. 701.

Colorado. Loveland v. Western Light & Power Co. (Colo.), 173 Pac. 717.

Georgia. Shinall v. Cartersville, 144 Ga. 219, 87 S. E. 290; *Gracen v. Savannah*, 142 Ga. 141, 82 S. E. 453; *Sewell v. Tallapoosa*, 145 Ga. 19, 88 S. E. 577.

Illinois. People ex rel. v. Sand-berg Co., 282 Ill. 245, 118 N. E. 469.

Kansas. Humphreys v. Pratt Board of Comrs., 93 Kan. 413, 144 Pac. 197; *State ex rel. v. Fran-cisco*, 98 Kan. 808, 160 Pac. 217.

Kentucky. Ex parte Covington, 160 Ky. 146, 169 S. W. 718; *Barry v. New Haven*, 162 Ky. 60, 171 S. W. 1012.

Louisiana. Henderson v. Shreve-port, 137 La. 667, 69 So. 88.

Mississippi. Sick v. Bay St. Louis, 113 Miss. 175, 74 So. 272.

Missouri. Bauch v. Cabool, 165 Mo. App. 486, 148 S. W. 1003.

North Carolina. Bramham v. Durham, 171 N. C. 196, 88 S. E.

quire a public utility, as a water,⁹ or telephone system.¹⁰ Many local laws exact the consent of the electors for other purposes.

§ 2196. How question submitted.¹¹

The procedure laid down in the controlling law must be followed, in substance at least, to validate the election and the action to be taken thereunder.¹²

Thus where the law contemplates that it can be initiated by ordinance or resolution only, passed by the legislative body in due form, such step cannot be disregarded.¹³

347; *Burwell v. Lillington*, 171 N. C. 94, 87 S. E. 970; *Briggs v. Raleigh*, 166 N. C. 149, 81 S. E. 1084.

New Jersey. *Schuck v. Stone Harbor Borough*, 87 N. J. L. 484, 95 Atl. 133.

New York. *Flood Abatement Com. v. Merritt*, 158 N. Y. S. 289, 94 Misc. Rep. 388.

South Carolina. *Herbert v. Griffith*, 99 S. C. 1, 82 S. E. 986; *Connolly v. Beason*, 100 S. C. 71, 84 S. E. 297.

South Dakota. *Spangler v. Mitchell*, 35 S. D. 335, 152 N. W. 339.

Texas. *Cohen v. Houston* (Tex. Civ. App.), 176 S. W. 809.

Washington. *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410; *Washington-Oregon Corporation v. Chehalis*, 76 Wash. 442, 136 Pac. 681; *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331.

Wisconsin. *Janes v. Racine*, 155 Wis. 1, 143 N. W. 707.

United States. *Wheeler v. Denver*, 231 Fed. 8, 145 C. C. A. 196.

⁹ *Enterprise Real Estate Co. v. Charleston*, 107 S. C. 492, 93 S. E. 184.

¹⁰ *Spangler v. Mitchell*, 35 S. D. 335, 152 N. W. 339.

¹¹ *Oxnard v. Bellah*, 21 Cal. App. 33, 130 Pac. 701.

Bond issue. *Enterprise Real Estate Co. v. Charleston*, 107 S. C. 492, 93 S. E. 184.

¹² *Lanigan v. Gallup*, 17 N. M. 627, 131 Pac. 997.

¹³ Either by resolution or ordinance. *Kerlin v. Devils Lake*, 25 N. D. 207, 141 N. W. 756.

May be by order of board; ordinance is not always necessary. *State ex rel. v. Hackman*, 277 Mo. 56, 202 S. W. 7.

By ordinance; sufficient if it observes the requirements of the applicable law. *Humphrey v. Pratt Board of Comrs.*, 93 Kan. 413, 144 Pac. 197.

An ordinance to authorize a bond issue for specified purpose is required to be filed for public inspection before its final passage. *O'Bierne v. Elgin*, 187 Ill. App. 581.

Ordinance provided: First section expressed in proper language the desire of the corporate authorities that the indebtedness should be increased, and the sec-

§ 2197. Notice of election.¹⁴

The provisions as to notice are usually regarded as mandatory and must be substantially complied with; they cannot be ignored.¹⁵

The notice in its recitals should observe the mandatory legal provisions, otherwise the election and the action authorized thereby will be void.¹⁶

and provided that a special election should be held for the purpose of submitting to the electors the question of whether or not the indebtedness should be increased, and for due legal notice of the election. This was sustained. *Egan v. Claysville*, 239 Pa. 259, 86 Atl. 860; *Storch v. Lansdowne Borough*, 239 Pa. 306, 86 Atl. 861.

Where the determination of the desire, ability or necessity of incurring a bonded debt by a municipality should be initiated by resolution or ordinance, all the authorities concur that when a statute delegates to a municipal corporation the power to issue bonds in a prescribed way, if the municipality should desire to issue bonds, such municipal action is required. The municipality must act in the manner prescribed by its charter. An election should be held in the mode prescribed by law for the calling of it, and when the law contemplates that it can only be initiated by ordinance or resolution, the election will not be valid unless the statutory requirements are followed. *Shinall v. Cartersville*, 144 Ga. 219, 87 S. E. 290.

¹⁴ *Colorado. Loveland v. Western Light & Power Co. (Colo.)*, 173 Pac. 717.

Florida. Miami v. Romfh, 66 Fla. 280, 63 So. 440.

Georgia. Sewell v. Tallapoosa, 145 Ga. 19, 88 S. E. 577.

Kentucky. Kimbley v. Ownesboro, 175 Ky. 532, 195 S. W. 1087.

Kansas. Perry v. Davis, 97 Kan. 369, 154 Pac. 1127.

Kentucky. Ex parte Covington, 160 Ky. 146, 169 S. W. 718.

Louisiana. Helton v. Martin, 141 La. 835, 75 So. 740; *Henderson v. Shreveport*, 137 La. 667, 69 So. 88.

Missouri. Bauch v. Cabool, 165 Mo. App. 486, 148 S. W. 1003.

Minnesota. Bakus v. Virginia, 123 Minn. 48, 142 N. W. 1042.

New York. Re Common Council, Lackawanna, 143 N. Y. S. 198, 158 App. Div. 263.

North Dakota. Kerlin v. Devils Lake, 25 N. D. 207, 141 N. W. 756.

N. Carolina. Brigga v. Raleigh, 166 N. C. 149, 81 S. E. 1084.

Ohio. Cincinnati v. Puchta, 94 Ohio St. 431, 115 N. E. 278.

Pennsylvania. Graham v. Lebanon, 240 Pa. 337, 87 Atl. 567.

Texas. Hunter v. Rice (Tex. Civ. App.), 190 S. W. 840.

Wyoming. First National Bank v. Laramie, 25 Wyo. 268, 168 Pac. 728.

¹⁵ *Hatfield v. Covington*, 177 Ky. 124, 197 S. W. 535, 537.

¹⁶ *Bozeman v. Sweet, C. F. & Co.*, 246 Fed. (C. C. A.) 370.

A statute requiring the public notice by advertisement of the

. However, a compliance with the spirit and purpose of the law in such manner as to afford the public an opportunity to know when and where the election was to be held and the object of the same is all that is necessary.¹⁷

§ 2198. Form and scope of question or questions submitted.¹⁸

When the election is to create an indebtedness, the call therefore must recite the objects and purposes, (if more than one) for which the indebtedness is proposed to be incurred, and the terms thereof must be clearly stated.¹⁹

And if the proposition is a bond issue, the amount of the bonds desired to be issued must be given.²⁰

election that the "amount of the existing debt" of the municipality be contained therein is mandatory and failure to comply therewith invalidates the assessment. "This wise provision is to enable the elector to act not only intelligently, but prudently, in casting his ballot for or against a proposed increase of the indebtedness of his municipality, and it is mandatory upon the public authority." *McGuire v. Philadelphia*, 245 Pa. 307, 91 Atl. 628.

Notice must specify the kind of bonds, to be issued. Bonds with terms differing from those specified in the notice cannot be issued. *Amarillo v. W. L. Slayton & Co.* (Tex. Civ. App. 1919), 208 S. W. 967, 970.

¹⁷ *State ex rel. v. Hackman*, 277 Mo. 56, 202 S. W. 7, 13, approving *Leach v. McDonald*, 231 Mo. 586, 132 S. W. 1075.

The words of the notice of the election are to be understood by the voters in their popular, natural and ordinary meaning. *Raff*

v. Philadelphia, 256 Pa. 312, 100 Atl. 815, 817.

The law required the notice to be published at least once a week for four consecutive weeks immediately prior to the election. A notice so published, the last insertion being thirteen days before the election was adjudged a sufficient compliance. *Albuquerque v. Water Supply Co.*, 24 N. M. 368, 174 Pac. 217, 221.

¹⁸ *Wheeler v. Denver*, 231 Fed. 8, 145 C. C. A. 196; *Helton v. Martin*, 141 La. 835, 75 So. 740; *Henderson v. Shreveport*, 137 La. 667, 69 So. 88; *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410.

¹⁹ *State v. Clausen*, 87 Wash. 111, 151 Pac. 251, following *Hansard v. Green*, 54 Wash. 161, 103 Pac. 20, 24 L. R. A. (N. S.) 1273, 132 Am. St. Rep. 1107, holding void an ordinance submitted which did not specify the plan of payment for the proposed improvement.

²⁰ *First National Bank v. Laramie*, 25 Wyo. 268, 168 Pac. 728.

Propositions for incurring indebtedness for more than one object or purpose, it is generally held, may be submitted at the same election.²¹

Thus an election on the question of purchase of a waterworks plant and an election on the question of a bond issue to pay the purchase price may be held contemporaneously.²²

In such case, however, there must be a separate proposition on the ballot for each distinct, unrelated and independent object or purpose for which indebtedness is contemplated, showing separately the amount desired for each, so that the elector may freely express his choice on each without thereby affecting the other.²³

Bond issue. *Beers v. Watertown* (S. D. 1920), 177 N. W. 502.

²¹ Section 2198, vol. 5, ante.

²² *Enterprise Real Estate Co. v. Charleston*, 107 S. C. 492, 93 S. E. 184, reaffirming *Paris v. Greenville*, 105 S. C. 180, 89 S. E. 669.

Dual questions. *Kerlin v. Devils Lake*, 25 N. D. 207, 141 N. W. 756.

Question of bond issue to construct a waterworks plant, and an electric light plant must be submitted separately, otherwise election void. *State ex rel. v. Brasington*, 93 S. C. 447, 76 S. E. 1086.

The ordinance followed the wording of the statute and provided for the issue of a specified amount of negotiable bonds of the municipality "for the purpose of securing funds for the construction or purchase of a system for supplying water to the city of Albuquerque and its inhabitants." It provided that ballots cast at the election should have printed thereon the words, "for waterworks bond issue," and "against waterworks bond issue." Although the provisions followed the word-

ing of the statute, the question was raised as to whether or not it is legal to submit upon a single ballot the question of issuing bonds for the construction or purchase of a system for supplying water, that is, whether it is submitting a double proposition. Authorities hold that a submission of the proposition to issue bonds for the purchase or erection of a plant is a joint proposition. "The weight of authority, however, is to the effect that such a proposition is to be considered, in substance as a proposition to acquire a waterworks system or other improvement either by purchase or construction, and that such submission is not invalid as submitting either a double or alternative question." *Albuquerque v. Water Supply Co.*, 24 N. M. 368, 174 Pac. 217, 220, distinguishing *Lanigan v. Gallup*, 17 N. M. 627, 131 Pac. 997.

²³ *Hartigan v. Los Angeles*, 170 Cal. 313, 149 Pac. 590, relying on *Clark v. Los Angeles*, 160 Cal. 321, 116 Pac. 966.

Two separate propositions can-

§ 2199. Conduct and time of election.²⁴

If the particular law by virtue of which the special election is held prescribes no method for conducting it the general election laws are applicable.²⁵

Where the general statutes confer authority upon a municipality to specify the manner of voting upon propositions for bond issues an ordinance regulating such matter has the force and effect of a statute and mandatory directions therein provided cannot be disregarded.²⁶

Substantial conformity to the legal requirements as to the manner of conducting the election, including the form of ballot,²⁷ will be sufficient. Where the constitution prescribes the form of ballot the language should not be given a technical construction like a common law instrument or a statute.²⁸

§ 2200. Same—counting the votes, return and record.²⁹

not be submitted jointly. Provision permitting indebtedness, on favorable vote of electors, "for the purpose of building a courthouse, jail, poorhouse, county sanitarium or other county buildings," held not authority to submit the proposition to construct two courthouses. *State ex rel. v. Gordon*, 268 Mo. 321, 188 S. W. 88.

²⁴ *State ex rel. v. Francisco*, 98 Kan. 808, 160 Pac. 217; *State ex rel. v. Hackman*, 274 Mo. 551, 203 S. W. 960; *Harrell v. Whigham*, 141 Ga. 322, 80 S. E. 1010; *Hardee v. Henderson*, 170 N. C. 572, 87 S. E. 498.

²⁵ *Schuck v. Stone Harbor Borough*, 87 N. J. L. 484, 95 Atl. 133.

Where question is submitted at an annual election, the law governing such elections applies. *D'Espard v. Essex Fels Borough*, 84 N. J. L. 181, 86 Atl. 172.

²⁶ *Inglewood v. Kew*, 21 Cal. App. 611, 132 Pac. 780.

²⁷ Form of ballot, held insufficient. *O'Bierne v. Elgin*, 187 Ill. App. 581.

Ballot, whether indefinite. *Kerlin v. Devils Lake*, 25 N. D. 207, 141 N. W. 756.

Specification in ballot as to amount. *Re Common Council, Lackawanna*, 143 N. Y. S. 198, 158 App. Div. 263.

Separate ballots, instead of a blanket ballot, held might be used at an election for bond issue. *Schuck v. Stone Harbor Borough*, 87 N. J. L. 484, 95 Atl. 133.

Ballots, marking, stamping, etc. *Inglewood v. Kew*, 21 Cal. App. 611, 132 Pac. 780.

²⁸ *Realty Inv. Co. v. Mobile*, 181 Ala. 184, 61 So. 248.

²⁹ *California. Inglewood v. Kew*, 21 Cal. App. 611, 132 Pac. 780.

Florida. Lasseter v. Hallowes, 67 Fla. 240, 64 So. 847.

Georgia. Sewell v. Tallapoosa, 145 Ga. 19, 88 S. E. 577.

§ 2201. Number of votes necessary.

As to the number of votes required to carry a proposition, the proper construction of the language of the applicable law is controlling.³⁰

Laws requiring a majority or a two-thirds, three-fourths, or three-fifths, vote, usually are construed to mean the requisite proportion of those voting at the election or on the proposition involved, and not of all the qualified electors of the municipality.³¹

In ascertaining the total vote cast at the election or on the proposition in question, to determine the requisite proportion, whether blank, unintelligible, illegal or rejected ballots should be counted, decisions are not always clear, and some conflict apparently exists, but aside from constructions resulting from the phraseology of particular laws, the salutary rule supported by the best considered judicial judgments is that only those ballots entitled by law to be counted should be considered, and hence, all blank, unintelligible, illegal or lawfully rejected

Kentucky. *Barry v. New Haven*, 162 Ky. 60, 171 S. W. 1012.

North Dakota. *Kerlin v. Devils Lake*, 25 N. D. 207, 141 N. W. 756.

Pennsylvania. *Knight v. Condersport Borough*, 246 Pa. 284, 92 Atl. 299.

³⁰ See § 419, ante; § 419, vol. 2, ante.

³¹ *State ex rel. v. Orear*, 277 Mo. 303, 311 to 313, 210 S. W. 392; *Marion v. Haynes*, 157 Ky. 687, 164 S. W. 79; *Bauch v. Cabool*, 165 Mo. App. 486, 148 S. W. 1003; *Spangler v. Mitchell*, 35 S. D. 335, 343, 152 N. W. 339.

The assent of two-thirds of the electors whose votes are cast on the question of incurring the indebtedness is all that is necessary, otherwise the legislature would

have been required to indicate by statutory enactment some means of ascertaining the entire number of legal voters in the municipality. *Fowler v. Oakdale*, 158 Ky. 603, 166 S. W. 195, 197, following *Render v. Louisville*, 142 Ky. 409, 134 S. W. 458, 32 L. R. A. (N. S.) 530.

Two-thirds of the legal voters of a city required, and not merely two-thirds of those voting at the election. *Bauch v. Cabool*, 165 Mo. App. 486, 501, 148 S. W. 1003.

In vote on question of bond issue where no proof to the contrary is presented the presumption arises that all qualified voters voted thereat. The election also was intended to incur an indebtedness. *Bauch v. Cabool*, 165 Mo. App. 486, 148 S. W. 1003.

ballots should be disregarded. In brief, only legal votes, votes of qualified electors cast in manner and form as provided, should be counted.³²

The proposition that illegal votes can be counted in estimating the requisite majority, and put out of view for all other purposes, does not appear sound. That votes can be counted for one purpose and rejected for all others is an acceptance of a principle in part only. The true doctrine is that a principle once accepted must be accepted in its entirety, and permitted to work out its own legitimate results.

§ 2202. Effect of irregularities and attack on validity of election.

In the absence of fraud, or attempt to mislead the voters, or express declaration in the law to the contrary, mere irregularities, which do not prevent a full and free expression of opinion of the will of the electors, and change the result will not invalidate the election.³³

But a disregard of mandatory requirements, or matters

³² State ex rel. v. Clausen, 72 Wash. 409, 130 Pac. 479 (reviewing many decisions); Bott v. Wurts, 62 N. J. L. 107, 40 Atl. 740; Wightman v. Tecumseh, 157 Mich. 326, 122 N. W. 122; Murdock v. Strange, 99 Md. 89, 57 Atl. 628, 3 Ann. Cas. 66.

"If it is impossible to determine the answer of an elector to a question submitted to the election his ballot should not be counted upon that question. A ballot is merely the instrument by which a voter expresses his choice between candidates or a question; and where the voter expresses no choice he has not voted for either candidate, nor on the question. If upon any proposition the law requires that there shall be a majority of the votes cast at

the election in order that the proposition should carry, it would be necessary to reckon with his vote. But if it is necessary to have a majority of those voting at such an election upon the question, his vote would not be reckoned with, for he did not vote upon the question." Wellsville v. Connor, 91 Ohio St. 28, 109 N. E. 526.

Women voters not counted under particular law in ascertaining the votes to be counted to determine whether the proposition carried by the prescribed vote. "The comparison should be made by measuring male votes with male votes." Sears v. Maquoketa, 183 Ia. 1104, 166 N. W. 700.

³³ Effect of irregularities. Re Common Council, Lackawanna, 143

of substance, will vitiate the election and preclude valid contemplated action thereunder.³⁴

N. Y. S. 198, 158 App. Div. 263; Kerlin v. Devils Lake, 25 N. D. 207, 141 N. W. 756.

Irregularities in election not affecting the result will not invalidate. Howard v. Luke, 18 Ariz. 563, 164 Pac. 439, citing § 2202, vol. 5, ante; Barry v. New Haven, 162 Ky. 60, 171 S. W. 1012.

Slight irregularities will not be permitted to frustrate the fairly expressed will of the voters. Bakus v. Virginia, 123 Minn. 48, 142 N. W. 1042, 1044.

Certain irregularities under charter whose provisions were not clearly disregarded; the election sustained. Wheeler v. Denver, 231 Fed. 8, 145 C. C. A. 196.

Failure to keep open registered books as required, held did not invalidate the election. Hardee v. Henderson, 170 N. C. 572, 87 S. E. 498.

Irregularities, although preventing votes, which would not change the result may be disregarded, since an election will not be set aside for irregularities unless they affect the result. Loveland v. Western Light & Power Co. (Colo.), 173 Pac. 717.

The receiving of illegal or improper votes will not alone vitiate an election. It must be shown affirmatively in order to overturn the declared result that the wrongful action changed it. Sargent v. Sante Fe, 24 N. M. 411, 174 Pac. 424.

Irregularity in the form of the published notice which is not serious will not invalidate the elec-

tion or the bonds authorized to be issued thereat. Perry v. Davis, 97 Kan. 369, 154 Pac. 1127.

Mere irregularity in connection with an election in the case of the notice will not of itself invalidate an election, but it must further be shown that if the statute had been strictly complied with the result would have been different. Albuquerque v. Water Supply Co., 24 N. M. 368, 174 Pac. 217, 221.

Irregularities as to form of ballot, in the absence of fraud, or attempt to mislead the voters, etc., will be disregarded. Seyboldt v. Mt. Rainer, 130 Md. 69, 99 Atl. 960.

"Mere irregularity in the form of a ballot or in the ordinance calling the election that do not prevent a full and free expression of the will of the electors are immaterial and will not vitiate the election." State v. Andresen, 75 Or. 509, 518, 147 Pac. 526, 529, citing § 2202, vol. 5, ante.

In the absence of such legal requirement, an ordinance providing for an election to vote on a bond issue for public improvements is not void because it fails to carry an appropriation to pay the expenses of the election. Kansas City v. Woerishoeffter, 249 Mo. 1, 27, 28, 155 S. W. 779.

Injunction to enjoin issuance of bonds, burden on plaintiff to establish invalidity of election. Bauch v. Cabool, 165 Mo. App. 486, 148 S. W. 1003.

³⁴ Disregarding a matter of sub-

“Authority to create an indebtedness and to issue bonds is derived solely from the statute. The proceedings being wholly statutory, there must be a full compliance with the essential requirements; otherwise the bonds cannot become an enforceable obligation against the city.”³⁵

If the indebtedness to be incurred exceeds the constitutional limit, it cannot be sanctioned by a vote of the electors.³⁶

Statutory proceedings to validate elections are often provided.³⁷

§ 2203. Effect of favorable vote.³⁸

stance in holding an election will result in rendering the election void. *O'Bierne v. Elgin*, 187 Ill. App. 581.

An election held within a shorter time after the passage of the ordinance authorizing it than allowed by law is invalid. *Shinall v. Cartersville*, 144 Ga. 219, 87 S. E. 290.

³⁵ *State v. Clausen*, 87 Wash. 111, 151 Pac. 251.

Validity as to time of payment of bonds. *Minden-Edison Light & Power Co. v. Minden*, 94 Neb. 161, 142 N. W. 673.

³⁶ *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410.

³⁷ *Harrell v. Whigham*, 141 Ga. 322, 80 S. E. 1010.

Legislative act may validate by retroactive act, if not forbidden by the constitution, or if it does not impair the obligation of contracts or destroy vested rights. *Swartz v. Carlisle Borough*, 237 Pa. 473, 85 Atl. 847, with dissenting opinions.

In Pennsylvania, when a ballot is not lacking in any matter essential to a free expression in statu-

tory form of the will of the voter, in the absence of fraud, the statute provides a complete remedy by application to the court; denying that the election should be set aside in equity after it has occurred. *Knight v. Coudersport Borough*, 246 Pa. 284, 92 Atl. 299.

³⁸ *Barry v. New Haven*, 162 Ky. 60, 171 S. W. 1012; *Lepley v. Ft. Benton*, 51 Mont. 551, 154 Pac. 710; *State v. Andresen*, 75 Or. 509, 518, 147 Pac. 526, 529, citing § 2203, vol. 5, ante.

On favorable vote an ordinance is passed providing for the mode of creating the indebtedness, etc. *Barry v. New Haven*, 162 Ky. 60, 171 S. W. 1012.

Where a proposition is favorably voted on by the electors, as to construct a city hall, expenses incident to the general plan, as the erection of cells in a police court, may be paid out of the money appropriated in accordance with the vote of the people on the bond issue. *Champion Iron Co. v. South Omaha*, 93 Neb. 56, 139 N. W. 848.

§ 2204. Successive elections.

When a proposition is submitted and rejected some laws limit the time within which the same proposition may be submitted again.³⁹

³⁹ O'Connor v. Waterford, 156
N. Y. S. 933, 171 App. Div. 425.

CHAPTER 41.

DEBT LIMIT OF MUNICIPALITIES.

- § 2205. Debt limit provisions considered as a whole.
- § 2206. Same—provisions limiting indebtedness to income and revenue provided for current year.
- § 2207. Same—debt limit as prescribed by legislature.
- § 2208. Same—debt limit as governed by charter.
- § 2209. Same—additional debt limit for water, sewers, light, etc.
- § 2210. Same — indebtedness incurred before the first assessment.
- § 2211. Operation and effect of constitutional provisions.
- § 2213. To what municipalities and boards debt limit provisions apply.
- § 2214. Same—debt of political division as indebtedness of another political division having same or conflicting territory.
- § 2215. Indebtedness defined and what constitutes.
- § 2217. Same—indebtedness arising ex delicto.
- § 2218. Same—contingent debts.
- § 2219. Same—current expenses.
- § 2220. Same—debts in anticipation of collection of revenues.
- § 2221. Same—option to purchase as creation of debt.
- § 2223. Same—mortgage or pledge without personal liability as indebtedness.
- § 2225. Same—judgment against municipality as an indebtedness.
- § 2226. Same—funding or refunding debts as creation of indebtedness.
- § 2227. Effect of money in treasury to meet liabilities.
- § 2228. Liabilities payable out of special funds only.
- § 2229. Same—obligations payable from special assessments.
- § 2230. Same — liability payable solely from income of property.
- § 2232. Time when indebtedness arises.
- § 2234. Evading debt limit provisions.
- § 2236. Assessed value of property as basis of calculation.
- § 2237. Computation of amount of indebtedness actually outstanding.
- § 2239. Effect of exceeding debt limits and remedies of creditors.

§ 2205. Debt limit provisions considered as a whole.¹

Constitutional limitations on indebtedness are con-

¹ State ex rel. v. Holmes, 81 Wash. 403, 142 Pac. 1148; Scott v. Tacoma, 81 Wash. 178, 142 Pac. 467; McGuire v. Philadelphia, 245 Pa. 287, 91 Atl. 622.

The constitution prohibits any

strued as prohibitory, self-enforcing, and are to be observed strictly.²

Certain indebtedness is frequently excluded,³ as debts already incurred,⁴ debts authorized under laws in force prior to the adoption of the constitution,⁵ current expenses,⁶ necessary expenses,⁷ "ordinary and necessary

subdivision of the state from incurring any indebtedness in any year in excess of the income and revenue for such year, unless at least two-thirds of the voters of such subdivision consent to such indebtedness, which in no event can exceed ten per centum of the total assessed value of the taxable property of such subdivision at the assessment of the same next before the last assessment made previous to the incurring of such indebtedness. *State ex rel. v. Gordon*, 251 Mo. 303, 308-310, 158 S. W. 683.

Cannot exceed current revenue unless authorized by vote. *Michael v. Stoka* (Okl. 1920), 185 Pac. 96.

²*State ex rel. v. Gordon*, 251 Mo. 303, 308, 158 S. W. 683.

"Without doubt, a city would be without power to incur an indebtedness beyond specific limitations fixed in its charter, or by law under which it derives its power; nor would a court have power to require a city to do a thing beyond the power accorded it." *Intermela v. Perkins*, 205 Fed. 603, 123 C. C. A. 619.

One dealing with a municipality must take notice of the debt-limit provision. *German National Bank v. Covington*, 164 Ky. 292, 175 S. W. 330, 332.

³By constitution in case of "emergency" may exceed debt

limit; "emergency" defined. *Summels v. Clinton* (Ky. 1919), 211 S. W. 567.

⁴*Lucas v. Florence*, 103 S. C. 169, 87 S. E. 996.

⁵*Ashland Waterworks Co. v. Ashland*, 251 Fed. (C. C. A.), 492, 496-498.

⁶Section 2219, post; § 2219, vol. 5, ante.

⁷Forbidding except for "necessary expenses," which include bonds to improve public ways, water and electric light plant, electric fire system and municipal buildings. *Kinston v. Security Trust Co.*, 169 N. C. 207, 85 N. E. 399.

Construction and repair of sidewalks. *Bramham v. Durham*, 171 N. C. 196, 88 N. E. 347.

Street improvements. *Harrold v. Huntington*, 74 W. Va. 528, 82 N. E. 476.

School buildings are not, and to authorize a debt for, a vote of electors is required. *Gastonia v. Citizens' National Bank*, 165 N. C. 507, 81 S. E. 755, following *Hollowell v. Borden*, 148 N. C. 256, 61 S. E. 638.

Streets, waterworks, sewerage and electric lights are necessary expenses, and a debt may be contracted to pay for them without submitting the proposition to a vote of the electorate. *Gastonia v. Citizens' National Bank*, 165

expenses authorized by the general laws of the state,"⁸ temporary loans or loans to supply casual deficiencies of revenue,⁹ liabilities and expenditures imposed by the state,¹⁰ and indebtedness, not exceeding a named limit for specified purposes, for example, to acquire public utilities, as water, gas, or light plant, or a telephone system.¹¹

So constitutional limitations, it has been held, are inapplicable to mandatory obligations created by the constitution or obligation necessary to maintain the existence of the corporation. It is recognized that the maintenance of the municipal government is essential to the health, safety and general welfare of the community, and consequently the limitations of indebtedness imposed are not intended to be so far exclusive as to require the suspension of governmental functions;¹² e. g., a fire department for a populous community.¹³

To create a valid indebtedness under debt-limit pro-

N. C. 507, 81 S. E. 755; *Hotel Co. v. Red Springs*, 157 N. C. 137, 72 S. E. 837; *Jones v. New Bern*, 152 N. C. 64, 67 S. E. 173.

⁸ *Feil v. Coeur D'Alene*, 23 Idaho 32, 129 Pac. 643, 43 L. R. A. (N. S.) 1095.

⁹ *Whigham v. Gulf Refining Co.*, 20 Ga. App. 427, 93 S. E. 238.

¹⁰ Municipal debt limit provisions created by statute, held not applicable to liabilities and expenditures imposed by state, as expense of special election for school bond issue. *State ex rel. v. Bentley*, 98 Kan. 442, 157 Pac. 1197.

¹¹ Certain kinds of public utilities bonds are excluded. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421.

Forbidding in excess of a named

percentage of the assessed valuation for debts for general municipal purposes, and authorizing debts in addition of a certain percentage for the purpose of acquiring public utilities. *Attorney General v. Lindsay*, 178 Mich. 524, 145 N. W. 98.

Indebtedness shall not exceed a certain percentage of the assessed value of taxable property, but a municipality may incur indebtedness not exceeding a named limit, as 10 per cent of such property for specified purposes, as for telephone system. *Spangler v. Mitchell*, 35 S. D. 335, 152 N. W. 339.

¹² *Patterson v. Edmonds*, 72 Wash. 88, 129 Pac. 895.

¹³ *State ex rel. v. Everett*, 191 Wash. 561, 172 Pac. 752.

visions of constitution, statute or charter, certain prerequisites are necessary: first, in order to determine the present indebtedness, laws require the proper authorities to ascertain the total value of the taxable property in the municipality or subdivision of the state concerned at the time named, sometimes at the last assessment and sometimes at the assessment next before the assessment previous to the incurring of the indebtedness; second, if it should be found that such indebtedness will not exceed the per centum specified of the assessed valuation of the property in the area involved, based on the assessment required to be taken to determine such per centum, a proposition must be submitted to the electors to enable them to approve or reject such proposition; and third, if the proposition should be approved by the required vote the indebtedness may be incurred in the manner provided, as the issuance of bonds which is the usual way, in the mode provided.¹⁴

§ 2206. Same—provisions limiting indebtedness to income and revenue provided for current year.¹⁵

§ 2207. Same—debt limit as prescribed by legislature.¹⁶

§ 2208. Same—debt limit as governed by charter.¹⁷

¹⁴State ex rel. v. Gordon, 251 Mo. 303, 309, 158 S. W. 683.

¹⁵California. Arthur v. Petaluma, 27 Cal. App. 782, 151 Pac. 183.

Idaho. Boise Development Co. v. Boise, 26 Idaho 347, 143 Pac. 531; Feil v. Coeur D'Alene, 23 Idaho 32, 129 Pac. 643, 43 L. R. A. (N. S.) 1095.

Kentucky. Marion v. Haynes, 157 Ky. 687, 164 S. W. 79; Walsh v. Pineville, 152 Ky. 556, 153 S. W. 1002; Southern Bitulithic Co. v. Detreville, 156 Ky. 513, 161 S. W. 560.

Oklahoma. Re Afton, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978; Fairbanks-Morse Co. v. Geary (Okl.), 157 Pac. 720; Fairbanks Co. v. Sulphur (Okl.), 161 Pac. 811.

United States. Santa Cruz v. Wykes, 202 Fed. 357, 120 C. C. A., affirming 184 Fed., 752.

¹⁶Shannon v. Cambridge, 231 Mass. 322, 121 N. E. 31.

¹⁷Smith v. Jefferson, 75 Or. 179, 146 Pac. 809, 814; Western New York Water Co. v. Laughlin, 157 N. Y. S. 257; North Michigan Water Co. v. Escanaba (Mich.), 165 N. W. 847, 853, 854; Portland v.

§ 2209. Same—additional debt limit for water, sewers, light, etc.¹⁸

Although a municipality has incurred a general indebtedness in excess of the debt limit, it may nevertheless, it has been held in Washington, incur an indebtedness within the limit prescribed, for a public utility, as waterworks.¹⁹

§ 2210. Same—indebtedness incurred before the first assessment.

In their debt limit provisions based upon valuation

Albee, 67 Or. 221, 135 Pac. 516; Morris v. Sheridan, 86 Or. 224, 167 Pac. 593.

¹⁸ Kimbley v. Owensboro, 175 Ky. 532, 196 S. W. 1087; McClintock v. Great Falls, 53 Mont. 221, 163 Pac. 99; Arnold v. Miles City, 46 Mont. 478, 128 Pac. 915; Lepley v. Ft. Benton, 51 Mont. 551, 154 Pac. 710.

Emergency authorizing the levy of a tax in excess of the legal rate, held did not exist in a city of a population of scarcely 10,000 as to waterworks and sewers. "It will not do to say that a municipal waterworks or a system of sewage arises to the dignity of an emergency. On the contrary, they are luxuries, or perhaps, necessities, of which the people of a small community might deprive themselves without unusual or extraordinary danger. It might be otherwise in a large city where there is a great aggregation of people residing; it certainly would not, however, be a necessity in the same sense to a country village." Marion v. Haynes, 157 Ky. 687, 164 S. W. 79, 84.

¹⁹ The constitution limited in-

debtedness for general purposes to 5 per cent of the taxable value of property, but with consent of three-fifths of voters an additional indebtedness not exceeding 5 per cent might be incurred for specific utilities. Held, for one of the named utilities—waterworks—city could incur an indebtedness of less than 5 per cent, etc., even though the general indebtedness exceeded 5 per cent and the aggregate indebtedness with the utility bonds will exceed 10 per cent. If city has incurred a general indebtedness in excess of the limit, that will not deprive the city of its right to issue bonds to the amount of 5 per cent, etc., for the purpose of purchasing a water system. "It was the manifest intention of the framers of the constitution, and of the people in its adoption, that a city should be authorized to incur an indebtedness to the extent of five per cent upon the assessed valuation of its property for the purpose of purchasing, owning and controlling such a system." Schooley v. Chehalis, 84 Wash. 667, 147 Pac. 410, 412.

of taxable property to be taken from the last assessment,—constitutions take no account of the organization of new towns and cities and their subsistence pending a future assessment which furnishes the basis of calculation for the indebtedness. Under a constitutional provision that “in incorporated cities, the assessment shall be taken from the last assessment for city purposes,” it was held that warrants issued by a town in process of organization and before an assessment has been made are valid if they are within the first assessment made for city purposes. “The last is necessarily first in this instance, for there never was, and from the very nature of things could not have been a last assessment for city purposes within the contemplation of the constitution.” Unless this is permitted “towns in the process of organization cannot do business until after an assessment has been made, no matter what their necessities or emergencies may be.”²⁰

§ 2211. Operation and effect of constitutional provisions.²¹

As stated, constitutional provisions forbidding the incurring of indebtedness except in the manner specified are mandatory and strictly construed, and sometimes it is said that each step required to be taken should be literally followed.²² They are construed as self-enforcing.²³

²⁰ *Re Woolley*, 75 Wash. 206, 134 Pac. 825, 827, approving *Childs v. Anacortes*, 5 Wash. 452, 32 Pac. 217 (cited in § 2236, vol. 5, ante).

²¹ *Renfroe v. Atlanta*, 140 Ga. 81, 78 N. E. 449, 45 L. R. A. (N. S.) 1173; *Arnold v. Miles City*, 46 Mont. 478, 128 Pac. 915; *Lepley v. Ft. Benton*, 51 Mont. 551, 154 Pac. 710; *Holmgren v. Moline*, 269 Ill. 248, 109 N. E. 1031; *State ex rel. v. Continental Zinc Co.*, 272 Mo. 43, 197 S. W. 112; *Parker v. Wallace*, 142 N. Y. S. 523, 80 Misc. Rep. 425.

Consolidation, annexation, etc.,

of municipalities, held not to affect constitutional debt limits. *Moore v. Pittsburgh*, 254 Pa. 185, 98 Atl. 1037.

Constitution prohibited incurring debts beyond a specified limit, except those “authorized under laws in force prior to the adoption of the constitution.” *Ashland Waterworks Co. v. Ashland*, 251 Fed. (C. C. A.) 492, 496-498.

²² *State ex rel. v. Gordon*, 251 Mo. 303, 308, 158 S. W. 683.

²³ *State ex rel. v. Gordon*, 251 Mo. 303, 309, 158 S. W. 683.

§ 2213. To what municipalities and boards debt limit provisions apply.²⁴

§ 2214. Same—debt of political division as indebtedness of another political division having the same or conflicting territory.

The constitutional limitation upon the extent of corporate indebtedness usually applies to each municipal corporation separately, and where one corporation embraces in part the same territory as others, each may contract corporate indebtedness up to the constitutional limitation without reference to any other corporation embraced wholly or in part within its area.²⁵

Bonds issued by a board of education which is not a corporation separate and apart from the municipality in which situate constitute a part of the municipal indebtedness.²⁶

²⁴ Prohibiting the incurring of any obligation for meeting which the necessary funds are neither on hand nor in prospect, held to apply only to the governing authorities of municipalities and parishes, not to political board, e. g., commissioners of the port of New Orleans. *Geary v. New Orleans Board of Commissioners*, 139 La. 781, 72 So. 245.

Inapplicable to commissioners managing the city waterworks under the municipal charter. *Mesmer v. Los Angeles Board of Public Service Comrs.*, 23 Cal. App. 578, 138 Pac. 935, 937.

Charter provision, held inapplicable to a board of water commissioners authorized by legislative act to improve the water system and issue bonds for this purpose, with respect to the letting of contracts. "It was in-

tended to be and is for the most part, a separate board, empowered with practically exclusive jurisdiction with respect to matters pertaining to the water supply." *Western New York Water Co. v. Laughlin*, 157 N. Y. S. 257, 261, 262.

See § 2214, post.

²⁵ *People ex rel. Honeywell*, 258 Ill. 319, 101 N. E. 571 (following *Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 203); *Highway Comrs. v. Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471; *Coppin v. Covington Board of Education*, 155 Ky. 387, 159 S. W. 937, approving *Ex parte Newport*, 141 Ky. 329, 132 S. W. 580, 37 L. R. A. (N. S.) 1034, Ann. Cas. 1912C, 447 (cited in § 2214, vol. 5, ante).

²⁶ *Walsh v. Pineville*, 152 Ky. 556, 153 S. W. 1002.

The rule is otherwise where the board of education is a distinct corporation from the municipality.²⁷

§ 2215. Indebtedness defined and what constitutes.²⁸

The indebtedness of a municipality, (as stated in a Pennsylvania case) like that of an individual, is what it owes and can be called upon to pay, and in that state, the constitutional limitation upon its power to contract indebtedness is fixed without regard to what assets, real or personal, it may own.²⁹

Thus where the municipality is bound in law to pay a specified sum, or discharge a particular obligation, a liability, a debt is created.³⁰

Accordingly in a Kentucky case, it was said that a contract to purchase or re-rent a water and electric light plant creates an indebtedness when executed.³¹

In Pennsylvania it is said that "debt" and "indebtedness," used in the constitution are to be given their general and popular meaning. They "are not used in any technical way, but in their proper general meaning of all contractual obligation to pay in the future for considerations received in the present."³²

If when a city makes a contract, for a filtration plant for example, it has on hand funds available, that is, suffi-

²⁷ Ex parte Newport, 141 Ky. 329, 132 S. W. 580, 37 L. R. A. (N. S.) 1034, Ann. Cas. 1912C, 447.

See § 2213, ante.

²⁸ Santa Cruz v. Wykes, 202 Fed. 357, 366-368, 120 C. C. A. 485, affirming 184 Fed. 752; Renfroe v. Atlanta, 140 Ga. 81, 78 S. E. 449, 45 L. R. A. (N. S.) 1173; Scott v. Tacoma, 81 Wash. 178, 142 Pac. 467.

²⁹ McGuire v. Philadelphia, 245 Pa. 287, 91 Atl. 622.

³⁰ Boise Development Co. v.

Boise, 26 Idaho 347, 143 Pac. 531.

A vote to cover improvement work executed by the city to the contractor, held not the creation of a debt forbidden by the debt limit provision, in view of the particular circumstances. Monk v. Moultrie, 145 Ga. 843, 90 S. E. 71.

³¹ Benjamin v. Mayfield, 170 Ky. 446, 186 S. W. 169.

³² Lesser v. Warren Borough, 237 Pa. 501, 85 Atl. 839, 43 L. R. A. (N. S.) 839, quoting from Keller v. Scranton, 200 Pa. 130, 49 Atl. 781, 86 Am. St. Rep. 708.

cient in amount to meet its obligations under the contract as they mature, obviously no indebtedness is thereby created. It is a cash transaction.³³

Where the indebtedness less its cash assets and outstanding taxes does not exceed the limit prescribed the city is not indebted in excess, etc. In determining whether a city is indebted beyond the limit its cash assets, such as money on hand and taxes due, may be deducted.³⁴

While claims for damage to property set up by a corporation against a city, which are uncertain, contingent, unsettled and unliquidated, and which have never in any manner been reduced to a definite or fixed amount of indebtedness by judgment, arbitration, or compromise, do not constitute debts, but when a contract between the corporation and the city which liquidates, settles and fixes as a definite amount of indebtedness these sums so claimed, the amount so fixed, it is held, would constitute a new debt.³⁵

§ 2217. Same—indebtedness arising ex delicto.³⁶

§ 2218. Same—contingent debts.³⁷

§ 2219. Same—current expenses.³⁸

³³ *McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99.

³⁴ *Forsyth v. Seattle*, 73 Wash. 515, 132 Pac. 224.

³⁵ *Boise Development Co. v. Boise*, 26 Idaho 347, 143 Pac. 531, 536, 537, relying on *Feil v. Coeur D'Alene*, 23 Idaho 32, 129 Pac. 643, 43 L. R. A. (N. S.) 1095.

³⁶ Judgment against the city for a tort. *Metropolitan Life Ins. Co. v. Deasy* (Cal. App. 1919), 183 Pac. 243.

³⁷ *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421.

³⁸ *California. Arthur v. Petaluma* (Cal.), 165 Pac. 698.

Georgia. Waycross v. Tomberlin, 146 Ga. 504, 91 S. E. 560; *Whigham v. Gulf Refining Co.*, 20 Ga. App. 427, 93 S. E. 238.

New York. O'Reilly v. Kingston, 161 N. Y. S. 632, 175 App. Div. 207.

Oregon. Morris v. Sheridan, 86 Or. 224, 167 Pac. 593.

Publication of freeholders charter. *Arthur v. Petaluma*, 27 Cal. App. 782, 151 Pac. 183, 186.

Apparatus for an electric plant to be paid for in 30 days if after trial satisfactory, held not creation of indebtedness. *Diamond*

§ 2220. Same—debts in anticipation of collection of revenues.³⁹

Under a constitutional requirement that a municipality shall keep its running expenses within the income and revenue provided for that year, a city cannot tie up its revenues for one or two years in advance; it cannot create an indebtedness to be paid from revenues arising in years to come. The revenues and income provided for each year must pay the expenditures of such year.⁴⁰

Of course, a city may anticipate the income and revenue provided for any year and incur debts and liabilities accordingly to be paid out of such income and revenue, but in order to purchase a public utility, as a water, electric light and power plant or a telephone system, or street railway, the receipts from rates of such utilities

Power Specialty Co. v. West Point, 11 Ga. App. 533, 75 S. E. 903.

Council resolution to employ and pay accountants and engineers for designated purpose, not creation of indebtedness. *Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 498.

Contract extending beyond the fiscal year for meals for prisoners payable when meals are furnished, held not a present indebtedness forbidden by constitution. *Rogers v. Oklahoma City*, 45 Okl. 269, 145 Pac. 357.

"Ordinary and necessary expenses authorized by the general laws of the state," are excluded. *Feil v. Coeur D'Alene*, 23 Idaho 32, 129 Pac. 643, 43 L. R. A. (N. S.) 1095.

"Necessary expenses" are excluded which include bonds for street improvements, water and electric light plant, electric fire system and municipal buildings. *Kinston v. Security Trust Co.*, 169 N. C. 207, 85 N. E. 399.

Construction and repair of streets and sidewalks, held necessary expense. *Bramham v. Durham*, 171 N. C. 196, 88 S. E. 347.

Providing for the cost of street improvements out of current revenues in not contracting a debt within the meaning of the constitutional limitation. *Harrold v. Huntington*, 74 W. Va. 528, 82 S. E. 476.

Liabilities and expenditures imposed by state outside of municipal control—as expense of a special election for school bonds—are not subject to statutory restriction applicable to municipal debt limit. *State ex rel. v. Bently*, 98 Kan. 442, 157 Pac. 1197.

Payment for construction of city hall not included in "current expenses." *State v. Harvey* (Wash. 1919), 182 Pac. 931.

³⁹ *Holmgren v. Moline*, 269 Ill. 248, 109 N. E. 1031.

⁴⁰ *Re Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978.

being an income or revenue within the constitution, a city cannot, it has been held, undertake to appropriate and hypothecate such income for a period of years, to make such purchase.⁴¹

§ 2221. Same—option to purchase as creation of debt.⁴²

§ 2223. Same—mortgage or pledge without personal liability as indebtedness.⁴³

A mortgage of a light and water plant and income arising therefrom, to secure payment of public utility certificates, it has been held in Illinois, creates an indebtedness.⁴⁴

And in Pennsylvania, bonds secured only by specific property, as waterworks, it is held, creates a debt. In that case the court observed: "To permit a borough or city to borrow money under a contract that it shall not be liable for its payment, but that the lender must look solely to pledged municipal property or assets, would in effect, annul the constitutional restriction upon municipal improvidence, and strike down a safeguard against municipal profligacy."⁴⁵

§ 2225. Same—judgment against municipality as an indebtedness.⁴⁶

⁴¹ Feil v. Coeur D'Alene, 23 Idaho 32, 129 Pac. 643, 43 L. R. A. (N. S.) 1095.

Bonds issued to purchase a public utility payable from the revenues of such utility, held not creating a debt. Twichell v. Seattle (Wash. 1919), 179 Pac. 127.

⁴² Ft. Worth v. Reynolds (Tex. Civ. App.), 190 S. W. 501; Janes v. Racine, 155 Wis. 1, 143 N. W. 707.

⁴³ Palmer v. Albuquerque, 19 N. Mex. 285, 142 Pac. 929.

⁴⁴ Leonard v. Metropolis, 278 Ill. 287, 115 N. E. 813, approving Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861.

⁴⁵ Lesser v. Warren Borough, 237 Pa. 501, 85 Atl. 839, 843, 43 L. R. A. (N. S.) 839.

See § 2230, post; § 2230, vol. 5, ante.

⁴⁶ Cary v. Long (Cal. 1919), 184 Pac. 857.

Judgment against municipality for a tort. Metropolitan Life Ins. Co. v. Deasy (Cal. App. 1919), 183 Pac. 243.

§ 2226. Same—funding or refunding debts as creation of indebtedness.⁴⁷

The funding or refunding of a debt previously created and existing is not an increase of indebtedness, but is merely a continuation thereof.⁴⁸

§ 2227. Effect of money in treasury to meet liabilities.⁴⁹

§ 2228. Liabilities payable out of special funds only.

Warrants in the nature of bonds issued by a hospital board payable out of a special fund which alone is pledged for their payment, it is held in Illinois, impose a burden on the city and create a debt within the meaning of the constitution. Money cannot be obtained in advance for immediate use to be repaid out of funds raised by taxation without creating an indebtedness. Such is the rule in Illinois.⁵⁰

In Kentucky, improvement bonds which are not payable wholly out of a special fund derived from the assessment on the property benefited but where the faith and credit of the city are pledged for their payment, they are a personal obligation of the city, and if they represent an indebtedness in excess of the revenue and income for the year in which the indebtedness was incurred

⁴⁷ Long Beach v. Lisenby (Cal. 1919), 179 Pac. 198; Walsh v. Pineville, 152 Ky. 556, 153 S. W. 1002.

In Kentucky fourth class cities may discharge or refund any indebtedness created prior to the adoption of the present constitution by bond issue, not exceeding such indebtedness, without a vote of the electors, and making provision for annual interest, and a sinking fund to pay principal. Benjamin v. Mayfield, 170 Ky. 446, 186 S. W. 169.

⁴⁸ Schuldice v. Pittsburgh, 251 Pa. 28, 95 Atl. 938.

⁴⁹ Smith v. Jefferson, 75 Or. 179, 146 Pac. 809, 814, 815; McClintock v. Great Falls, 53 Mont. 221, 163 Pac. 99; Forsyth v. Seattle, 73 Wash. 515, 132 Pac. 224.

⁵⁰ Holmgren v. Moline, 269 Ill. 248, 109 N. E. 1031, approving Ottumwa v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604, and disapproving Swanson v. Ottumwa, 118 Iowa 161, 91 N. W. 1048, 59 L. R. A. 620 (both set out in § 2231, vol. 5, ante).

without a vote of the people, they come within the inhibition of the constitution and are void.⁵¹

§ 2229. Same—obligations payable from special assessments.

Contracts for local improvements, the cost of which is to be borne wholly by the property benefited form no part of the indebtedness of the municipality within the meaning of constitutional provisions. However, where improvement bonds are not payable wholly out of a special fund derived from the assessment on the property so benefited, but the faith and credit of the city are pledged for their payment, they become a personal obligation of the city.⁵²

§ 2230. Same—liability payable solely from income of property.⁵³

§ 2232. Time when indebtedness arises.⁵⁴

⁵¹ German National Bank v. Covington, 164 Ky. 292, 175 S. W. 330.

⁵² German National Bank v. Covington, 164 Ky. 292, 175 S. W. 330.

“Drainage assessments are not debts within the meaning of the constitutional limitation. They are in the nature of an exchange for benefits received by the enhanced value of the property derived from the improvement to pay which the assessment is made. The limitation of the constitution is against becoming indebted for general corporate purposes, and has no reference whatever to assessments for local improvements.” *People ex rel. v. Honeywell*, 258 Ill. 319, 101 N. E. 571.

An act (pay-as-you-go act) prohibiting a city from expending any of the proceeds of the sales of

corporate stock or serial bonds for other than revenue producing improvements was held not applicable to the payment of assessments against the city payable out of the street and park opening fund, but the acquisition of land required for other public purposes. *Schiefelin v. Craig*, 170 N. Y. S. 603, 608, 183 App. Div. 515.

⁵³ “It has been generally held, and the rule is that the debt limitation does not apply to a debt that is a lien upon specific property, and is not chargeable to the general fund.” *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117.

City may contract for water supply each year to the extent it can be paid for out of the income for such year. *State ex rel. v. Continental Line Co.*, 272 Mo. 43, 197 S. W. 112.

⁵⁴ Contract to purchase or re-

§ 2234. Evading debt limit provisions.⁵⁵**§ 2236. Assessed value of property as basis of calculation.⁵⁶**

rent a water and electric light plant, creates an indebtedness when executed. *Benjamin v. Mayfield*, 170 Ky. 446, 186 S. W. 169.

⁵⁵ A tax levy in excess of that allowed by law in order to pay a judgment against the city is void, since "a city cannot evade the statute by permitting a legal liability to be fixed by way of judgment." *People ex rel. v. Cleveland, C. C. & St. L. Ry. Co.*, 271 Ill. 195, 110 N. E. 1021, following *Chicago & Alton R. Co. v. People*, 177 Ill. 91, 52 N. E. 439.

A city was up to its debt limit. It made a contract to purchase a water system, payable in 20 years by bonds, but providing that the city should not be liable to pay the bonds, yet that it would maintain water rates sufficiently high to maintain the system, and set aside a surplus to pay the bonds within 20 years, and that it would keep the system intact and free from all incumbrances. Held, violated the debt limit provisions of the constitution. *Feil v. Coeur D'Alene*, 23 Idaho 32, 129 Pac. 643, 43 L. R. A. (N. S.) 1095.

⁵⁶ *Hansen v. Hoquiam*, 95 Wash. 132, 163 Pac. 391, 393, approving *Halsey & Co. v. Belle Plaine*, 128 Iowa 467, 104 N. W. 494, and disapproving *Chicago v. Fishburn*, 189 Ill. 367, 59 N. E. 791 (cited in § 2236, vol. 5, ante).

In no case can it exceed 5 per cent of valuation of the taxable property therein to be ascertained from the last assessment for state

and county purpose previous to the incurring of such indebtedness. *Re Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978; *Fairbank-Morse Co. v. Geary (Okl.)*, 157 Pac. 720.

In New York, by express mandate of the constitution, the question whether a city has become indebted in excess of the prescribed percentage is to be determined by reference to the assessment rolls of such city on the last assessment for state or county taxes prior to the incurring such indebtedness. *People ex rel. v. Brown*, 216 N. Y. 674, 110 N. E. 171, affirming 169 App. Div. 695, 155 N. Y. S. 564.

Where the assessed value of the property is made the basis of calculation, it is sometimes provided that the assessed value is to be taken at the assessment of same next before the last assessment made previous to the incurring of the indebtedness which has been construed to mean the two successive, antecedent, completed assessments made by the constituted authorities "previous to the incurring of the indebtedness," the last phrase having reference to the time when such authorities were required to ascertain whether the proposed indebtedness exceeded the constitutional limit and not to the time when such debt, if authorized, will become obligatory. *State ex rel. v. Gordon*, 251 Mo. 303, 308-310, 158 S. W. 683.

The fact that a city had not

§ 2237. Computation of amount of indebtedness actually outstanding.⁵⁷

been in existence long enough to have two completed assessments prior to incurring the indebtedness cannot take it out of the limitation. If that were not so a city during the first two years of its organization would be wholly free from the debt limit. *Sidey v. Marceline*, 237 Fed. 168, 150 C. C. A. 314.

See *Re Woolley*, 75 Wash. 206, 134 Pac. 825; § 2210, ante; § 2210, vol. 5, ante.

⁵⁷ *Detroit v. Engel* (Mich. 1919), 173 N. W. 547.

Include in the estimate the proposed indebtedness and all outstanding contracted indebtedness, contracted in a previous year or years, whether bonded, floating, or of whatever kind, but the current expenses of the city for the current year are not to be included, under section 158, but must be under section 157 of the constitution. *Winchester v. Nelson*, 175 Ky. 63, 103 S. W. 1040.

Money misapplied is viewed as in the treasury in determining the debt limit. *State Bank v. Miami*, 43 Okl. 809, 144 Pac. 597.

Misapplication of funds for the current year to pay obligations of a prior year, will be regarded as in the treasury, in ascertaining the debt limit. *Fairbanks Co. v. Sulphur* (Okl.), 161 Pac. 811.

Temporary loans to improvement districts and the waterworks fund are equivalent to cash, because of the legal certainty that they will be repaid. *Seymour v. Ellensburg*, 81 Wash. 365, 142 Pac. 875, 877,

following *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107.

Delinquent taxes to be regarded as cash assets, but after six years the presumption arises they have been paid, and hence cannot be treated as cash assets. *Seymour v. Ellensburg*, 81 Wash. 365, 142 Pac. 875, following *Graves v. Stone*, 76 Wash. 88, 135 Pac. 810, as to proposition of presumption of payment after the lapse of six years.

Outstanding solvent debts deductible from the gross indebtedness are debts due to the municipality directly, payment of which it can enforce as one of its quick assets for the liquidation of any of its obligations. *McGuire v. Philadelphia*, 245 Pa. 287, 91 Atl. 622, approving *Elliot v. Philadelphia*, 229 Pa. 215, 78 Atl. 107; *Schuldice v. Pittsburgh*, 251 Pa. 28, 95 Atl. 938.

Unliquidated damages to landowners from a public improvement are debts within the meaning of the constitution, and when estimated by the appropriate public authorities, such estimate may be taken as a sufficient basis upon which to determine the amount of indebtedness to be incurred by reason of the improvement. Estimate as to benefits which may be assessed against property holders is altogether too uncertain and speculative to be accepted as a proper item of deduction. *Schuldice v. Pittsburgh*, 251 Pa. 28, 95 Atl. 938.

Local assessments made upon

§ 2239. Effect of exceeding debt limits and remedies of creditors.

The latest judicial judgments uniformly adhere to the general rule firmly established that contracts or indebtedness in excess of the debt limit are invalid to the extent of the excess,⁵⁸ can not be ratified,⁵⁹ will not sustain a

property for local improvements are not within the provisions of debt limits. They are not to be considered in determining the municipal tax under the constitution of the limit of municipal indebtedness thereunder. *Wickliffe v. Greenville*, 170 Ky. 528, 186 S. W. 476.

Stocks of merchants to be included in determining tax valuation of property. *Bauch v. Cabool*, 165 Mo. App. 486, 148 S. W. 1003.

Certain debts to be excluded by the constitution. *Beachram v. Greenville*, 104 S. C. 421, 89 S. E. 401. See § 2205, ante.

Contingent debts excluded and certain utility bonds excepted by the constitution. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421.

Indebtedness created before the constitution was adopted, excluded by that instrument. *Kimbley v. Owensboro*, 175 Ky. 532, 195 S. W. 1087.

Waterworks bonds issued under a special statute, held excluded in estimating city indebtedness. *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117.

Bonds issued in lieu of a prior invalid issue, which are destroyed after the granting of an injunction against their issuance, clearly are not to be included in ascertaining the bonded indebtedness.

Worley v. Idleman, 285 Ill. 214, 120 N. E. 472.

The prohibition contemplates a present and not a future indebtedness. Therefore, the probable cost of maintaining and operating a lighting system in the future can not enter into the question. *Barry v. New Haven*, 162 Ky. 60, 171 S. W. 1012, 1015.

A contract for the erection of buildings authorized by a bond issue is not a further increase of indebtedness where money is on hand to meet all obligations created by a contract. *Stratton v. Allegheny County*, 245 Pa. 519, 91 Atl. 894.

Further offsets. *Schuldice v. Pittsburgh*, 251 Pa. 28, 95 Atl. 938.

⁵⁸ Debts sought to be created in excess of debt limit—revenue and income for the year—are void. *Re Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978; *Fairbanks-Morse Co. v. Geary* (Okl.), 157 Pac. 720.

Purchase of lighting plant by village in excess of its debt limit; effect on rights of mortgagee. *Lewis v. Clay City E. L. & P. Co.*, 194 Ill. App. 208.

Contract creating an indebtedness is void as to the excess. *Southern Bitulithic Co. v. Detreville*, 156 Ky. 513, 161 S. W. 560.

⁵⁹ A debt attempted to be created in excess of a limitation in

recovery thereon,⁶⁰ and all persons dealing with the municipality are chargeable with notice thereof.⁶¹

the constitution cannot be ratified by a vote of the people. *Re Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978 *O'Neil Engineering Co. v. Ryan*, 32 Okl. 738, 124 Pac. 19.

If the existing general indebtedness "has been incurred in excess of the constitutional limit, such excess indebtedness could not be enforced, neither could it be validated by a vote of the people." *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410; *Patterson v. Edmonds*, 72 Wash. 88, 120 Pac. 895; *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873.

Cannot be ratified, because of absence of original power of authorization. Legislation seeking to cure must conform to debt limit of constitution. *Re Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978; *Eureka Fire Hose Mfg. Co. v. Granite (Okl.)*, 159 Pac. 308.

⁶⁰ *German National Bank v. Covington*, 164 Ky. 292, 175 S. W. 330.

Contract void if it exceeds debt limit, and there can be no recovery thereon. *Boise Development Co. v. Boise*, 26 Idaho 347, 143 Pac. 531.

City defending claim because in excess, etc., has burden. *Fairbanks Co. v. Sulphur (Okl.)*, 161 Pac. 811.

"In no form can such debt be held valid upon any theory of quantum meruit or equitable estoppel. The absolute lack of power to contract such indebtedness bars every form of action and every legal device by which recovery is sought. Nor will the courts aid the vendor to recover the property sold and delivered under such illegal contract." *Fairbanks-Morse Co. v. Geary (Okl.)*, 157 Pac. 720, 722, quoting from *Gray, Limitation of the Taxing Power*, § 274, which is quoted and approved in *Eureka Fire Hose Mfg. Co. v. Granite (Okl.)*, 159 Pac. 308, 311.

⁶¹ *Re Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978.

Warrants issued in excess of the debt limit are void, and persons handling them are charged with constructive notice thereof. *Rankin v. Chariton*, 160 Iowa 265, 141 N. W. 424.

See § 2176, ante; § 2176, vol. 5, ante.

CHAPTER 42.

MUNICIPAL WARRANTS AND LIKE EVIDENCES OF INDEBTEDNESS.

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| § 2250. Interest on warrants. | § 2261. Mandamus. |
| § 2251. Rights of holders of warrants in general. | |
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§ 2241. Definition and nature.

“A warrant of a municipal or quasi-municipal corporation is in fact only the order of one of its officers upon another of its officers to pay some of its funds to a third party.”¹

¹ Per Sanborn, C. J., in *Hornblower v. Pierre*, 241 Fed. 450, 154 C. C. A. 282, citing § 2245, p. 4759, vol. 5, ante.

“A city warrant is nothing more than a device for liquidating an existing municipal indebtedness or a certificate of indebtedness which is neither intended to nor does create any new debt.” *Washington-Oregon Corporation v. Chehalis*, 76 Wash. 442, 136 Pac. 681, 684, citing § 2241, vol. 5, ante.

“To issue a certificate of indebtedness acknowledging a pre-

existing debt is in no sense to loan credit.” *Washington-Oregon Corporation v. Chehalis*, 76 Wash. 442, 136 Pac. 681, 684.

“A warrant of a municipal corporation is a general order payable when the funds are found. * * * It is in effect, in this state, an assignment seriatim of that amount of the funds against which it is drawn. A warrant even lacks the stable quality of a definite time of payment peculiar to a bond or note, and will only be paid when there is sufficient

A warrant is sometimes characterized as a promissory note,² or more properly a non-negotiable promissory note.³

But as often pointed out, a warrant possesses none of the attributes or qualities of commercial paper save the capacity of being transferred by delivery or assignment.⁴

However, it is sometimes regarded or treated at least as negotiable in so far as it affects the rights of a bona fide holder thereof. Decisions hold that such a warrant possesses all of the qualities of negotiable paper save one, namely, that it is open to any defense which might have been made to the claim upon which it is founded.⁵

money in that particular fund on which it is drawn to cash it." State ex rel. v. Pasco Reclamation Co., 90 Wash. 606, 156 Pac. 834, 836.

²International Bank v. Franklin County, 65 Mo. 105, 112.

³Morris v. Sheridan, 86 Or. 224, 167 Pac. 593, 597.

⁴Logan County Bank v. Farmer's National Bank, 55 Okl. 592, 155 Pac. 561.

⁵For all purposes involved, its title must be treated as negotiable. The rule applied to improvement warrants issued by a city. Marcus v. Ofner, 103 Wash. 478, 175 Pac. 31, approving and relying on Fidelity Trust Co. v. Parmer, 22 Wash. 473, 61 Pac. 158, 79 Am. St. Rep. 953, which was a case where plaintiff sued to recover the value of a city warrant which had been delivered to an attorney to be used as evidence in a case then pending in a court. The attorney instead of returning the same to his principal sold it to the defendant who paid par value therefor. At the conclusion of the case

for the plaintiff, the trial court directed judgment in his favor.

"Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregularly or fraudulently issued is an abuse of their true character and purpose. * * *

"Where the power is clearly given, and securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities and commercial paper generally.

. Under some laws, a warrant constitutes both a judicial ascertainment and a written acknowledgement of the indebtedness represented by it.⁶

§ 2242. Power to issue.⁷

If the law does not forbid, a warrant may be issued upon the general fund for a lawfully incurred obligation

"But where the power has not been given, parties must take municipal orders, drafts, certificates and other documents of the sort at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable; that is, transferable by deliver or indorsement. This quality renders them more convenient for the purposes of the holder, and has, undoubtedly, led to the idea so frequently, but as we think, erroneously, entertained, that they are invested with that other characteristic of commercial paper, freedom from all legal and equitable defenses in the hands of a bona fide holder. But every holder of a city order or certificate knows, that to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a bona fide holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create

an estoppel against the city itself, its taxpayers, or people. Persons receiving it from them know whether it is issued, and whether they receive it, for a proper purpose or a proper consideration. Of course, they are affected by the absence of these essential ingredients; and all subsequent holders take cum onere, and are affected by the same defect.

"We consider these principles to be so sound and fundamental as to make it a matter of some surprise that a different view should have been taken by some jurists of eminent ability." Nashville v. Ray, 19 Wall. (86 U. S.) 468, 478, 22 L. ed. 1127 (164).

⁶ International Bank v. Franklin County, 65 Mo. 105, 112.

⁷ Graves v. M. Griffin, O'Neil & Sons (Tex. Civ. App.), 189 S. W. 778.

Where under the municipal charter the care, management and control of the public schools have been vested in a school committee and such committee has under its direction the expenditures and money appropriated for the support and maintenance, etc., of the school, such committee has power to engage teachers and fix their salaries, and hence, a warrant drawn by such committee to pay

notwithstanding the want of money in such fund to pay such warrant.⁸

Authority to raise money by certificates of indebtedness extends to authority to put them in form necessary to secure purchasers, namely, negotiable form; "there being no essential difference between such certificates and bonds, as they are commonly known to the business world. The essence of each is that they contain a promise under the seal of the corporation to pay a certain sum to order or to bearer."⁹

§ 2243. Same—audit and allowance of claim as a condition precedent.¹⁰

§ 2245. Form and contents.

Warrants are creatures of statutory or charter law and can be issued only in accordance therewith.¹¹

an increase of salary due a teacher is authorized. *Hardy v. Lee*, 36 R. I. 302, 90 Atl. 383.

Meeting of council at which warrants were issued, whether at adjourned meeting. *Intermela v. Perkins*, 205 Fed. 603, 123 C. C. A. 619.

Warrants issued in excess of the debt limit are invalid. *Sheridan v. Rothschild*, 181 Ind. 405, 104 N. E. 66.

Warrants issued in violation of the constitutional debt limit are void, and no recovery can be had thereon. Such warrants cannot be validated by the court, nor by action of the municipal electors. *Re Afton*, 43 Okl. 720, 144 Pac. 184.

⁸ It was not claimed that the constitutional debt limit would be exceeded by the issuance of the warrant. *State ex rel. v. Irwin*, 74 Wash. 589, 134 Pac. 484.

⁹ *Denver v. Home Savings Bank*, 236 U. S. 101, 35 Sup. Ct. 265, 59 L. ed., affirming 200 Fed. 28, 118 C. C. A. 256.

¹⁰ Audit of bill by city council. *Thomas v. Platt*, 187 Ill. App. 643.

Where the proper municipal authorities acting within their power, fix the amount due on a contract, the amount so fixed becomes a debt due the person in whose favor it is made collectable by him from the municipality, and in such case it becomes the duty of the proper municipal officer, under some laws, to issue his warrant therefor, regardless of the fact whether he had or had not funds in hand applicable to the payment thereof, since it is for the municipality to provide for the payment of the account. *Herdman v. State*, 6 Boyce (Del.) 24, 96 Atl. 199.

¹¹ *Steffen v. Long*, 165 Mo. App. 254, 159, 147 S. W. 191, relying on

Recitals that warrants were issued for public improvements when in fact they were issued to raise money for a campaign as to the location of the state capital were held not to estop the city from raising the question of their illegality in an action thereon.¹²

§ 2246. Same—signature.

Warrants directed to be drawn by the proper municipal authorities in a legal manner, as by the enactment of an ordinance, must be signed by the officer designated.¹³

In brief, where the law requires that warrants shall be signed by a specified officer, they cannot be issued lawfully without such signature.¹⁴

§ 2247. Delivery.¹⁵

§ 2249. Warrants not negotiable.¹⁶

Isenhour v. Barton County, 190 Mo. 163, 170, 88 S. W. 759.

¹² *Hornblower v. Pierre*, 241 Fed. 450, 453, 454, 154 C. C. A. 282, affirming 231 Fed. 496.

¹³ *Com. v. Walton*, 236 Pa. 220, 84 Atl. 766.

¹⁴ *Steffen v. Long*, 165 Mo. App. 254, 259, 147 S. W. 191.

Mayor may be compelled by mandamus to sign a warrant for services rendered to the city where the bill therefor has been duly audited. *Thomas v. Platt*, 187 Ill. App. 643.

See § 2261, post.

¹⁵ "A warrant is not issued nor valid until delivered into the hands of the person authorized to receive it." *State v. Scott*, 102 Wash. 510, 173 Pac. 498, 500.

A warrant is a nullity until it is delivered. *Steffen v. Long*, 165 Mo. App. 254, 258, 147 S. W. 191; *Wilson v. Knox County*, 132 Mo. 387, 392, 34 S. W. 45.

¹⁶ *Logan County Bank v. Farmer's National Bank*, 55 Okl. 592, 155 Pac. 561; *Morris v. Sheridan*, 86 Or. 224, 167 Pac. 593.

A warrant is non-negotiable and any defense available against the original contractor to whom issued is also available against the assignee. *University State Bank v. Bremerton*, 86 Wash. 261, 150 Pac. 439.

"Purchasers of municipal warrants take subject to all defenses that may be made against them, and if warrants are void, they cannot be enforced even in the hands of an otherwise innocent holder." *State ex rel. v. Scott*, 102 Wash. 510, 173 Pac. 498, 500.

"City warrants are not negotiable instruments in the sense applied to unmatured commercial paper so as to cut off defenses unknown to the purchaser for value. Such drafts on the municipal treasury are prima facie valid evidence

§ 2250. Interest on warrants.¹⁷

Municipal corporations in the absence of constitutional or statutory inhibition may contract for the payment

of city indebtedness, but as against any holders, they are subject to all defenses the same as any open account or non-negotiable paper." *Klatskanie State Bank v. Rainier*, 72 Or. 243, 143 Pac. 909.

"It has become the settled law of this state in harmony with the rule elsewhere that municipal and state warrants are not negotiable instruments, and that when in the hands of assignees of persons to whom they were issued, they evidence no more binding obligation upon the municipality or state issuing them than when in the hands of the person to whom issued. In other words, they are simply assignable as non-negotiable choses in action." *Barker v. Seattle*, 97 Wash. 511, 166 Pac. 1143, 1146.

¹⁷*Alabama City G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91; *Cogswell v. Escanaba*, 176 Mich. 156, 142 N. W. 549; *Isenhour v. Barton County*, 190 Mo. 163, 170, 88 S. W. 759.

Warrants on special assessment funds. *Drexel State Bank v. La Moure*, 207 Fed. 702.

Failure to present warrants and coupons for payment, held not to preclude the subsequent accrual of interest thereon. *Ibid*.

Where the warrant expressly stipulates that it is a non-interest bearing instrument, the assignee thereof cannot recover interest thereon. *University State Bank v. Bremerton*, 86 Wash. 261, 150 Pac. 439.

Interest as penalty for delay in

payment of sewer warrants, held not collectable by holder of such warrants. *Seymour v. Oklahoma City*, 238 Okl. 547, 134 Pac. 45, 47 L. R. A. (N. S.) 702.

Notes providing for the payment of interest without authority are not void but the provisions as to interest will be treated as surplusage and the note viewed as evidence of indebtedness. *Forrest City v. Bank of Forrest City*, 116 Ark. 377, 172 S. W. 1148.

An informal agreement by the members of the board of aldermen that interest should be paid on warrants which agreement was not recorded in the proceedings of the board is of no effect. The law requires a record to the end that those who may be called to act under it may have no occasion to look beyond it. *Alabama City G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91, citing § 617, p. 1358, vol. 2, ante.

A certificate of deposit issued for money advanced for certain water pipe extension, held that the interest provided therein was to begin to run two years after its date. *Harts v. Chicago*, 189 Ill. App. 119, 121, following *Merchants Loan & Trust Co. v. Chicago*, 264 Ill. 76.

Certificate issued to a property owner who advanced money for certain work under an ordinance providing that if moneys so advanced are not paid back within two years that interest shall be allowed after the expiration of two

of interest on their warrants drawn to cover ordinary debts.¹⁸

§ 2251. Rights of holders of warrants in general.¹⁹

A holder of municipal warrants is chargeable with notice of all the restrictions in the law,²⁰ e. g., debt limit provisions.²¹

He takes them subject to the mode of payment prescribed,²² and all the defenses available against the person to whom issued.²³

To restate, municipal warrants are not commercial paper. They possess none of the attributes or qualities of commercial paper, save the capacity of being transferred by delivery or assignment. The holder stands exactly as the payee would have stood had he retained possession and title. His rights and remedies are essentially different from those of the holder of negotiable paper, and, as mentioned, the rights of the holder of such paper are subject to the same legal and equitable defenses as in the hands of the payee even when such warrants are payable to bearer or order.²⁴

years until paid, held that interest began to run at the expiration of two years. *Merchants Loan & Trust Co. v. Chicago*, 264 Ill. 76, 105 N. E. 726, affirming 182 Ill. App. 298.

¹⁸ *Alabama City G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91.

¹⁹ *Seymour v. Oklahoma City*, 38 Okla. 547, 134 Pac. 45, 47 L. R. A. (N. S.) 702.

Where the vendor sells to the vendee warrants purporting to be drawn on a special fund, there is an implied warranty that the warrants so sold are what they purport to be; that is, valid existing obligations against the state. *Logan*

County Bank v. Farmer's National Bank, 55 Okla. 592, 155 Pac. 561.

²⁰ *Hornblower v. Pierre*, 241 Fed. 450, 454, 154 C. C. A. 282, affirming 231 Fed. 496.

²¹ *Rankin v. Chariton*, 160 Iowa 265, 141 N. W. 424; *Re Afton*, 43 Okla. 720, 144 Pac. 184.

²² *Ostling v. People*, 57 Colo. 22, 140 Pac. 173, following *Stroyker v. Grand County Comrs.*, 77 Fed. 567, 23 C. C. A. 286.

²³ *University State Bank v. Bremerton*, 86 Wash. 261, 150 Pac. 439.

²⁴ *Logan County Bank v. Farmer's Bank*, 55 Okla. 592, 155 Pac. 561, following *Jack v. National Bank*, 17 Okla. 430, 89 Pac. 219.

§ 2252. Payment of warrants.²⁵

When funds to pay are on hand, warrants should be paid.²⁶

A warrant on general funds ordinarily is not payable until an appropriation has been made to pay either the warrant or the claim for which the warrant was given in payment.²⁷

§ 2253. Same—from what fund payable.²⁸

A warrant payable out of a local assessment fund is not converted into a general fund warrant because the city failed to provide a local assessment fund to pay it. Even if such fund had been provided and wrongfully diverted no such conversion could take place.²⁹

²⁵ Alabama City G. & A. Ry. Co. v. Gadsden, 185 Ala. 263, 64 So. 91.

²⁶ Intermela v. Perkins, 205 Fed. 603, 123 C. C. A. 619.

Where warrants have been issued, the holder thereof is entitled to payment. Harrold v. East St. Louis, 197 Ill. App. 121.

The obligation to pay the salaries of teachers is not released or varied by the fixing of the fiscal year, nor does the right to collect a salary covered by a warrant expire with the close of the fiscal year. It is a contract which the city has entered into through its properly authorized agents, and as such it must be recognized and carried out. Where there is sufficient amount remaining in the hands of the treasurer from the appropriation of the fiscal year, the warrant representing the salary should be paid from the unexpended balance. Hardy v. Lee, 36 R. I. 302, 90 Atl. 383.

Where a warrant has been issued and there was at the time when

issued and at the time when presented in the hands of the treasurer of the municipality, sufficient funds to the credit of the fund upon which such warrant is drawn, and not appropriated to any other use or purpose it should be paid, where the warrant has been properly indorsed and presented for payment in the usual manner. State ex rel. v. Burris, 91 Ohio St. 70, 109 N. E. 591.

²⁷ Inter Ocean Newspaper Co. v. West Hammond, 189 Ill. App. 110, 113.

Warrants issued and registered prior to the beginning of the fiscal year, held not payable from funds arising from revenues during such year. Ostling v. People, 57 Colo. 22, 140 Pac. 173.

²⁸ Indebtedness fund. Intermela v. Perkins, 205 Fed. 603, 123 C. C. A. 619.

Special assessment fund. Drexel State Bank v. La Moure, 207 Fed. 702.

²⁹ Barker v. Seattle, 97 Wash. 511, 166 Pac. 1143, 1146.

§ 2254. Same—priority of payment.³⁰

Under a law providing that the treasurer shall pay on demand in the order of their issue, any warrants when there shall be in the treasury sufficient funds applicable to such payment, it was held that the city council could not postpone the payment of a certain kind of warrants and prefer others where all had been drawn on the same fund. In such case the warrant holders have the right to have their warrants paid in regular course as funds become available and applicable to their payment.³¹

The burden is on the party asserting liability of a city to allege and prove a misappropriation of the fund out of which the warrants were payable, in that the warrants were paid out of their order and that the party complaining was damaged thereby.³²

§ 2256. Assignment of warrants.

Warrants are assignable subject to any defense existing in favor of the municipality against the original holder at the time of the assignment.³³

The assignment carries the right to prosecute an action thereon.³⁴

³⁰ *Morris v. Sheridan*, 86 Ore. 224, 167 Pac. 593, 598, citing § 2254, vol. 5, ante.

³¹ *Intermela v. Perkins*, 205 Fed. 603, 123 C. C. A. 619.

³² "It is the settled law of this state that, before a city or town can be charged with primary liability on account of having paid local improvement warrants subsequent in time and higher in number than those upon which the account is based, there must be a showing that there came into the fund money sufficient to pay all warrants, and the interest thereon, which were prior in time and lower in number than those upon which

the action is based and pay the warrants sued upon had not the money been diverted to the payment of warrants which were subsequent in time and higher in number." *Perkins v. Sidney*, 103 Wash. 595, 175 Pac. 301.

³³ *Morris v. Sheridan*, 86 Ore. 224, 167 Pac. 593, 597, citing § 2256, vol. 5, ante.

³⁴ *Morris v. Sheridan*, 86 Ore. 224, 167 Pac. 593, 598.

Warrants for amounts due and to become due issued to a contractor of street work, which were duly assigned, were held superior to the rights of the surety who completed the work due to its

If the law prescribes a form, such form must be followed, in order to transfer title.³⁵

§ 2257. Reissuance, funding and calling in for examination.³⁶

§ 2258. Actions on warrants.

One to whom warrants have been legally assigned may prosecute an action thereon.³⁷

However, there can be no action on warrants which are void, e. g., because in violation of the debt limit.³⁸

abandonment by the contractor subsequent to the assignment of the warrants. *State v. Scott*, 102 Wash. 510, 173 Pac. 498.

³⁵ *International Bank v. Franklin County*, 65 Mo. 105.

³⁶ Power given by statute to call in outstanding warrants for cancellation, reissuance or classification or for any lawful purpose whatever sustained. *Eureka Fire Hose Co. v. Furry*, 126 Ark. 231, 190 S. W. 427, holding action of de facto officers in calling in warrants valid.

³⁷ *Morris v. Sheridan*, 86 Ore. 224, 167 Pac. 593, 598.

Suit by bank on certificates of indebtedness which had been pledged by a city treasurer as collateral security for a note. The contract or loan was made without knowledge of the city and without any authority from it. The treasurer died and was a defaulter and the bank brought suit against the city for money advanced to it, which suit was denied. The present action was brought thereafter. Certificates had been issued by the city for municipal improvements and indorsed in blank by the orig-

inal holders. In this form they were delivered by the treasurer to the bank. Nothing on the face of the note made by the treasurer indicated that the collateral which he thus pledged was his individual property, and the bank in taking the certificates from him in pursuance of the right was presumed to have known that they were the property of the city, for he undertook to pledge them as its treasurer but without any authority whatever from it to do so. The present suit was instituted not upon the implied obligation of the city to pay, nor yet upon the note which was the basis of the transactions, but on the certificates of indebtedness which were pledged as security for the note. The bank was not an innocent purchaser without notice that the certificates did not belong to the treasurer in his own right. The bank was not dealing with him as an individual but with him as city treasurer, assuming to act for the city and in its name. *First National Bank v. New Castle*, 238 Pa. 146, 85 Atl. 1098.

³⁸ *Re Afton*, 43 Okla. 720, 144 Pac. 184.

But if a city retains the property for which warrants were issued, it may be liable thereon.³⁹

The general rule that in the absence of contrary evidence a presumption of ownership arises from the possession and control of personal property has been applied to warrants.⁴⁰

Although presentment of the warrants for payment is usually a condition precedent to suit thereon, this formality may be dispensed with if it would in view of the circumstances of the particular case, be useless, as the law never requires futile or nonessential things to be done.⁴¹

§ 2259. Same—defenses.

As a warrant is non-negotiable any defense available against the person to whom issued is also available against the assignee,⁴² even when the warrant is in the hands of a bona fide holder.⁴³

And it follows also that it is permissible to inquire

³⁹ Cogswell v. Escanaba, 176 Mich. 156, 142 N. W. 549.

⁴⁰ Sulphur v. State (Okla.), 162 Pac. 744, 747.

⁴¹ Where the municipality is denying its liability and seeking to escape payment and made no effort to pay the warrants by creating a fund therefor. Sulphur v. State (Okla.), 162 Pac. 744, quoting from and following Connersville v. Hydraulic Co., 86 Ind. 184.

⁴² University State Bank v. Bremerton, 86 Wash. 261, 150 Pac. 439.

City may set up defense that contracts upon which warrants were based were in excess of debt limit; but city must establish it, of course, because the warrants and claims are prima facie valid. State Bank of Miami v. Miami, 43 Okla. 809, 144 Pac. 597; Fairbanks Co. v. Sulphur (Okla.), 161 Pac. 811.

⁴³ Morris v. Sheridan, 86 Ore. 224, 167 Pac. 593, 597.

Under the established law of the land, warrants of a municipal or quasi-municipal corporation which are in fact only the orders of one of its officers upon another of its officers to pay some of its funds to a third party, carry upon their face the plain warning that the purchaser must beware, that while they are prima facie evidence of their validity they are always liable to be defeated, even in the hands of a bona fide purchaser without notice, but proof that they were issued fraudulently for a purpose beyond the powers of the corporation, and that when they were in fact issued and used for such a purpose, no recital or certificate of its officers that they were issued honestly for a purpose within the powers of the corporation

into the whole transaction between the original parties and to determine whether the provisions of the charter or law applicable designed to protect the fund of the city have been observed in their issuance.⁴⁴

§ 2260. Same—statutes of limitation as barring actions on warrants.⁴⁵

§ 2261. Mandamus.⁴⁶

can estop it from defeating them by proof of the truth. *Hornblower v. Pierre*, 241 Fed. 450, 453, 154 C. C. A. 282, affirming 231 Fed. 496, citing § 2245, p. 4759, vol. 5, ante.

"This has been the law of municipal and quasi-municipal warrants at least ever since Mr. Justice Bradley delivered the opinion of the Supreme Court in *Nashville v. Ray*, 19 Wall. (86 U. S.) 468, 477, 478, 22 L. ed. 1127 (164), in the year 1873," *Ibid*.

⁴⁴ *Klatskanie State Bank v. Rainier*, 72 Ore. 243, 143 Pac. 909. Presumption exists that officers performed their entire duty in issuing warrants, and it must be overcome by evidence of probative force, to set aside, etc. *Sulphur v. State (Okla.)*, 162 Pac. 744, 746.

⁴⁵ *Eureka Fire Hose Co. v. Furry*, 126 Ark. 231, 190 S. W. 427; *University State Bank v. Bremerton*, 86 Wash. 261, 150 Pac. 439.

Municipality as a condition to setting up limitation must first plead and prove it had provided a fund for the payment of such indebtedness. *Sulphur v. State (Okla.)*, 162 Pac. 744, 747.

⁴⁶ *Steffen v. Long*, 165 Mo. App. 254, 259, 147 S. W. 191.

After a bill has been duly audited, mandamus will lie to compel

the mayor to sign a warrant therefor when he has no discretion in the matter. *Thomas v. Platt*, 187 Ill. App. 643.

Mandamus will lie to compel the issuance of a warrant, wherein no discretion is involved, upon the general fund notwithstanding there is lack of money in such fund to pay it, provided the law does not forbid. *State ex rel. v. Irwin*, 74 Wash. 589, 134 Pac. 484.

Where the statute makes it mandatory on the city treasurer to issue a warrant to the proper person when his bill is approved by the appropriate municipal officers, mandamus will lie to compel the performance of the duty. Where the treasurer has no discretion and the bill has been approved by the proper authorities mandamus will lie to compel him to draw the necessary warrant. *State v. Herdman*, 5 Boyce (Del.), 555, 95 Atl. 549.

His return to such writ is insufficient where it does not appear that there was not sufficient money in his hands to pay the account. *Herdman v. State*, 6 Boyce (Del.) 24, 96 Atl. 199.

Mandamus to compel issuance of warrant upon the city treasurer for salary of school director will lie. *Stern v. Berkeley*, 25 Cal. App. 685, 145 Pac. 167.

CHAPTER 43.

MUNICIPAL BONDS.

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- II. POWERS TO ISSUE BONDS.
- III. FORM AND CONTENTS.
- IV. ISSUANCE, DELIVERY AND CONDITIONS PRECEDENT.
- V. SALE OR OTHER DISPOSITION OF BONDS.
- VI. NEGOTIABILITY AND RIGHTS OF TRANSFEREES.
- VII. ESTOPPEL AND RATIFICATION.
- VIII. BONA FIDE PURCHASERS.
- IX. RECITALS IN BONDS.
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¹ *Harmony v. Truman*, 212 Fed. 4 (U. S. C. C. A.), reversing 205 Fed. 549.

² *Arizona. Blount v. MacDonald*, 18 Ariz. 1, 155 Pac. 736.

Indiana. Indianapolis v. Robinson (Ind), 117 N. E. 861; *Pittsburgh, O. C. & St. L. Ry. Co. v. Schmuck*, 181 Ind. 323, 103 N. E. 325; *Bloomington v. Citizens' National Bank*, 56 Ind. App. 446, 105 N. E. 575.

Illinois. People v. Ross, 272 Ill. 285, 111 N. E. 987; *Burke v. Chicago*, 185 Ill. App. 228.

Mississippi. Sick v. Bay St. Louis, 113 Miss. 175, 74 So. 272.

New Jersey. Dale v. Bayhead Borough, 90 N. J. L. 49, 100 Atl. 329.

Oklahoma. Oklahoma City v. Duhme, 45 Okla. 75, 145 Pac. 408.

Pennsylvania. McAndrew v. Dunmore Borough, 245 Pa. 101, 91 Atl. 237.

Tennessee. Imboden v. Bristol, 132 Tenn. 562, 179 S. W. 147.

Washington. Tennent v. Seattle, 83 Wash. 108, 145 Pac. 83; *State ex rel. v. Seattle*, 74 Wash. 438, 133 Pac. 1005.

United States. Miller v. Hamilton, 233 Fed. 402, 147 C. C. A. 338.

Sewers, waterworks, fire departments, and street improvements. *Robinson v. Goldsboro*, 161 N. C. 668, 77 S. E. 948.

Improvement bonds payable only out of special assessments, levying a tax therefor is unauthorized and illegal. *People v. Ross*, 272 Ill. 285, 111 N. E. 987.

Street improvement bonds to be paid by special assessment, held not public securities or bonds under particular law as to certification. *Lawton v. West*, 33 Okla. 395, 126 Pac. 574.

Paving certificates, validity of issue. *Celaya v. Brownsville* (Tex. Civ. App.), 203 S. W. 153.

³ *State ex rel. v. Hackmann* (Mo. 1920), 218 S. W. 318, 330, 331, citing § 2270, vol. 5, ante.

See § 2226, ante; § 2226, vol. 5, ante; § 2282, post; § 2282, vol. 5, ante.

⁴ Reasonable expenses incurred in issuing bonds are incident to the purposes of the law and is not a misappropriation of the funds

§ 2271. Validity of bonds sustained, if possible.⁴

Bonds valid when issued cannot be rendered invalid by charter amendment.⁵

§ 2272. Interest.⁶**§ 2274. Who may attack bonds.**

One with full knowledge of certain defects and infirmities in a bond issue of an irrigation district, which do not relate to the power to issue such bonds, nor show that such power was exceeded, but which relate alone to irregularities in the manner of disposing of the bonds,

so as to invalidate the bonds. *Le-Roy v. Elizabeth City*, 166 N. C. 93, 81 S. E. 1072.

"The right to question the validity of bonds on the ground of irregularities in proceedings preliminary to their issuance ends with the negotiation of the bonds. Where the power to vote the bonds is absent the rule is different. So it has been held with respect to bonds attacked after negotiation, on the ground that the submission was double acquiescence in the issuance and sale of bonds bars the right to complain of doubleness in submissions." *State ex rel. v. Gordon*, 268 Mo. 321, 337, 338, 188 S. W. 88.

⁵ Assertion in a charter amendment that bonds issued pursuant to previous authorization were valid obligations of the city, while equivalent to further assurance, is unnecessary. "If, however, by such declaration funding or refunding bonds were contemplated, the assertion might have been proper." *Portland v. Albee*, 67 Ore. 221, 135 Pac. 897, 899, citing § 2270, vol. 5, ante.

⁶ Law allowed. *Robinson v. Goldsboro*, 161 N. C. 668, 77 S. E. 948; *McCrary Co. v. Brantley* (Ala.), 79 So. 602.

Rate regulated by law. If not paid at maturity a higher rate fixed as penalty. *Oklahoma City v. Duhme*, 45 Okla. 75, 145 Pac. 408.

If no provision in applicable law municipal authorities may regulate interest. *Paine v. Seattle*, 70 Wash. 294, 126 Pac. 628, 636.

However it must not be usurious. *Paine v. Seattle*, 70 Wash. 294, 126 Pac. 628, 636.

Like a note, the bond would only take effect upon delivery and bear interest from such date. *Venice v. Lawrence*, 24 Cal. App. 350, 141 Pac. 406.

Municipality held chargeable with interest on improvement bonds, where it wrongfully rebated to property owners before they paid for the improvement, and had not this occurred the municipality would have had on hand sufficient funds to discharge the interest. *Burke v. Chicago*, 185 Ill. App. 228.

or irregularities in the clerical work in issuing them, by silence and acquiescence will be estopped from questioning the validity of the bonds and the payment of assessments against his land to raise funds to pay such bonds. This case is to be distinguished and not "confused with that line of cases which hold that estoppel cannot be invoked against an interested party who seeks to have declared void bonds which have been issued without warrant of law, or in excess of the power conferred upon the issuing body." ⁷

§ 2275. Registration or certification of bonds.

As a condition precedent to the validity or negotiation of the bonds, registration is often required. When presented for registration the officer usually certifies by indorsement on the bonds that all requirements of the law have been observed in their issuance. Sometimes it is held, under particular laws, that such officer, although not exercising judicial functions, may decide whether on application of the law to the facts he should in compliance with the mandate of the law enter them on the register. ⁸

As the officer is not required to approve invalid bonds, ⁹ he may refuse registration and certification unless evidence is presented to him showing that all conditions of the law have been observed. ¹⁰

If, however, upon presentation of the bonds to the proper officer for registration, a *prima facie* showing is

⁷ *Page v. Oneida Irr. Dist.*, 26 Idaho 108, 141 Pac. 238, 240.

⁸ *State ex rel. v. Gordon*, 251 Mo. 303, 158 S. W. 683.

Improvement bonds, held not public securities or bonds under particular law as to certification by the attorney-general. *Lawton v. West*, 33 Okla. 395, 126 Pac. 574.

⁹ *Re Miami*, 43 Okla. 205, 141 Pac. 1174.

⁸ *McQ.*—32

Where a double proposition was submitted in violation of law, although carried by the requisite vote, the officer may refuse to register bonds. *State ex rel. v. Gordon*, 268 Mo. 321, 188 S. W. 88.

¹⁰ *State ex rel. v. Gordon*, 268 Mo. 321, 188 S. W. 88.

made that they have been issued in compliance with the conditions prescribed by law, it is the specific duty of such officer to register them in the manner required by law.¹¹

In the absence of any reasonable countervailing cause, mere non-action on the part of municipal authorities to proceed with a bond issue approved by the electors, will not suffice to relieve the proper officer from discharging the duty enjoined by law to register the bonds.¹²

§ 2276. Decisions of state courts as binding on federal courts.¹³

II. POWER TO ISSUE BONDS.

§ 2277. In general.

The validity of a bond issue is dependent on the applicable law.¹⁴

“The right to issue bonds of a designated district and territory, including the state, county, city, town, or other communities is neither a political nor governmental power, but a private corporate power conferred for local purposes.”¹⁵

¹¹ *State ex rel. v. Hackmann*, 274 Mo. 551, 203 S. W. 960.

¹² *State ex rel. v. Hackmann*, 273 Mo. 670, 202 S. W. 7, 16.

¹³ *Laredo v. Head*, 246 Fed. 825; *Sidney v. Marceline*, 237 Fed. 168, 150 C. C. A. 314; *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111.

¹⁴ Power to issue existed. *Laredo v. Frishmuth* (Tex. Civ. App.), 196 S. W. 190.

Bonds for water works system. *Wheeler v. Denver*, 231 Fed. 8, 145 C. C. A. 196.

Power denied to issue bonds for garbage disposal plant. *Riddle v. Atlantic City*, 89 N. J. L. 122, 97 Atl. 790.

Municipality is not authorized to

subscribe stock to a railroad company to aid its completion and issue bonds to pay for the same. *Burlingham v. New Bern*, 213 Fed. 1014, 1019.

Where there exists a fatal infirmity in the attempt of the municipal corporation to incorporate it has no power to issue bonds. *Beyer v. Athens*, 249 Fed. 849, 855.

Ratification of indebtedness and validation of bond issue by vote of people on change of law where bonds had been issued exceeding the debt limit. *Santa Cruz v. Wykes*, 202 Fed. 357, 373, 120 C. C. A. 485.

¹⁵ *Blount v. MacDonald*, 18 Ariz. 1, 155 Pac. 736.

The legislature has plenary powers over municipalities and the issue thereby of bonds for municipal purposes, and it can authorize a city to issue bonds for a legitimate municipal purpose without any submission of the question to the electorate of the city.¹⁶

If bonds are issued without authority of law they are absolutely void and no right as against the city can accrue under them; no action taken by the authorities of the city in regard to them confers any right upon the holder. The levy and collection of a tax to pay them is without authority of law and the holder acquires no right to the amount collected.¹⁷

Where bonds are issued of several distinct amounts, some which are authorized and some of which are not, if they can be separated the legal bonds will be sustained.¹⁸

§ 2278. Implied power to issue bonds.

As inherent power to issue does not exist a municipality may issue bonds only when duly empowered.¹⁹

§ 2279. Express power to issue bonds and construction thereof.

Subject to conditions stated express or implied power to issue bonds for specified purposes is generally conferred upon municipal corporations.²⁰

¹⁶ *Camp v. State*, 71 Fla. 381, 72 So. 483.

¹⁷ It is held by the city subject to the right of taxpayers to demand repayment. The application of the fund to other purposes by the city authorities is no concern of the bond holder, since no harm came to him by reason of the unlawful act of the city. *Burlingham v. New Bern*, 213 Fed. 1014.

¹⁸ *Munroe v. Reeves*, 71 Fla. 612, 71 So. 922.

¹⁹ *Schieffelin v. Hylan*, 174 N. Y. S. 506.

“The power of municipalities to issue bonds must be found in a legislative enactment. Such an enactment is a grant of authority from the state to the municipality, and must be construed with strictness against the grantee.” *Bradbury v. Idaho Falls* (Idaho 1918), 177 Pac. 388.

²⁰ *Portland v. Albee*, 67 Ore. 221, 135 Pac. 897; *Minneapolis Real*

In the exercise of the power, all mandatory provisions of the controlling law are to be observed in all substantial respects.²¹

Statutes on the same subject are construed together.²² When a bond issue is authorized by vote of the people to acquire, for example, a municipal water plant, dis-

Estate Board v. Minneapolis (Minn. 1920), 177 N. W. 494.

Law held to authorize issuance of. *Smith v. Raton*, 18 N. M. 613, 140 Pac. 109.

Granted subject to constitutional limitations to contract debts and borrow money and to issue bonds. *Kimbley v. Owensboro*, 176 Ky. 532, 195 S. W. 1087.

To raise funds for public utility, as lighting plant. *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331.

Lighting system. *Livermore v. Millville*, 82 N. J. Eq. 648, 90 Atl. 380.

To enlarge lighting plant. *Bradbury v. Idaho Falls* (Idaho 1918), 177 Pac. 388.

Water and light plants. *Backus v. Virginia*, 123 Minn. 48, 142 N. W. 1042.

To raise money to install filtration plant by bond issue, to comply with state law. *State ex rel. v. Dean*, 95 Ohio 108, 116 N. E. 37.

For the construction of wharves, harbors, landings, etc. *Pascagoula v. Delmas*, 108 Miss. 91, 66 So. 329.

For public work. *Tennent v. Seattle*, 83 Wash. 108, 145 Pac. 83.

To issue improvement bonds and pledge assessments to be made therefor to pay the same. *Miller v. Hamilton*, 233 Fed. 402, 147 C. C. A. 338.

Road improvement bonds. *Blount v. MacDonald*, 18 Ariz. 1, 155 Pac. 736.

Power to issue railway aid bonds and validity of town vote to authorize their issuance. *Harmony v. Truman*, 212 Fed. 4 (U. S. C. C. A.), reversing 205 Fed. 549.

Vote of people necessary to authorize issuance of bonds for an electric light plant. *State ex rel. v. Hackmann*, 274 Mo. 551, 203 S. W. 960.

To provide a city hall on vote of electors. *Thomas v. Gooding*, 27 Idaho 624, 149 Pac. 1064.

Express authority granted, but if they are to be issued beyond a specified limit they must be authorized by vote of people. *Heffner v. Krinn*, 95 Ohio 1, 120 N. E. 221.

On vote of people to raise money by bond issue to purchase waterworks. *Enterprise Real Estate Co. v. Charleston*, 107 S. C. 492, 93 S. E. 184.

For hospital. *Stokes v. Montgomery* (Ala. 1919), 82 So. 663.

²¹ *Burwell v. Lillington*, 171 N. C. 94, 87 S. E. 970.

²² Held, to authorize issuance of bonds for the construction of a combined water and electric light plant. *Loe v. Palco*, 103 Kan. 287, 173 Pac. 299.

cretion as to issuance and amounts thereof is sometimes vested in commissioners.²³

A law authorizing a bond issue for various purposes which does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose does not render it void. Such matter may properly rest within the sound discretion of the municipal authorities.²⁴

The power conferred is to be construed as restricted to the bonds authorized. Thus authority to issue building bonds does not include bonds for hospitals or a garbage reduction plant.²⁵

So authority to issue bonds to use the proceeds arising therefrom to retire matured bonded or floating indebtedness is not authority to issue bonds to construct a lighting plant.²⁶

So authority to issue bonds for a public utility is not authority to purchase a bridge across a running stream between the municipality and a township which is to be owned jointly, where the law provided that the utility was to be owned exclusively by such city.²⁷

So authority to issue bonds for the establishment and changing of channels of water courses, and constructing bridges over bays and streams, is not authority to issue bonds for the purpose of building docks or wharves, and incidentally, to purchase property for that purpose.²⁸

So authority to issue bonds for an extension of water-works, it is held, is not authority to issue bonds to reimburse the municipality for extensions made and paid for from money raised by taxation.²⁹

²³ *Wheeler v. Denver*, 231 Fed. 8, 145 C. C. A. 196.

²⁴ *Gastonia v. Citizens' National Bank*, 165 N. C. 507, 81 S. E. 755.

²⁵ *Detroit v. Engel*, 187 Mich. 88, 153 N. W. 537.

²⁶ *Brooks v. Sea Isle City* (N. J. L.), 83 Atl. 779.

²⁷ *Re Miami*, 43 Okla. 205, 141 Pac. 1174.

²⁸ *Pascagoula v. Delmas*, 108 Miss. 91, 66 So. 329, approving *Hazlehurst v. Mayes*, 96 Miss. 656, 51 So. 890.

²⁹ "It does not follow that because the town might have borrowed the money for these extensions at the time they were voted that it can do so now after they are paid for." *Chapin v.*

So under a law which authorized the issuance of bonds "for the purpose or purposes hereinafter named," and which specified in detail, the "following named purposes," it was held that, as the word, "named" meant "specified," it did not include a municipal auditorium and the necessary site therefor when not named therein.³⁰

On the other hand, constitutional authorization of municipal taxation "for the erection of public buildings, streets, sewers, waterworks and other permanent improvements," it has been held, is authority to issue bonds for the acquisition by purchase or the construction of an electric light plant.³¹

So express power to issue bonds for necessary expenses without a vote of the people authorizing it, includes bonds for sewer, waterworks, fire department and street improvements.³²

So authority to issue bonds for the construction and maintenance of waterworks, is authority to repair, since repairing is maintenance.³³

Under express power to issue bonds in the amount of \$100,000 for water and sewer systems with a specification that the denomination should be \$1,000, that they should be numbered from one to fifty, that not more than \$50,000 should be used for the sewerage system and the balance for the water system, it was held that \$50,000 of the bonds was intended to be issued for each system respectively, and hence the bonds should be issued as two series, one for the sewerage and one for the water.³⁴

§ 2280. Whether bonds issued for a public purpose.³⁵

Lincoln, 217 Mass. 336, 104 N. E. 745.

³⁰ Colvin v. Ward, 189 Ala. 198, 66 So. 98.

³¹ Simpson v. Nacogdoches (Tex. Civ. App.), 152 S. W. 858.

³² Robinson v. Goldsboro, 161 N. C. 668, 77 N. E. 948.

³³ Herbert v. Griffith, 99 S. C. 1, 82 S. E. 986.

³⁴ Seyboldt v. Rainier, 130 Md. 69, 99 Atl. 960.

³⁵ "Municipal bonds can lawfully be issued only for municipal purpose; and when a proposed issue of bonds appears to be for a mu-

§ 2282. Funding and refunding bonds.³⁶**§ 2284. Debt limit provisions.**

Limitations as to indebtedness usually apply to bond issues, and when they do, to validate the bonds, they must be observed.³⁷

All laws on this subject should be construed together.³⁸

municipal purpose, the statute does not require the proceedings taken by the municipality or by the proper electorate preliminary to the issue of the bonds, to designate the particular municipal purpose for which they are intended to be used.

* * * Should an attempt be made to use the bonds or their proceeds for another than an appropriate municipal purpose, any interested party has a remedy." *Perry v. Panama City*, 67 Fla. 285, 65 So. 6.

Public utility. *State ex rel. v. Cincinnati Street Ry. Co.*, 97 Ohio 283, 119 N. E. 735; *Atty-Gen. v. Detroit Common Council*, 164 Mich. 369, 129 N. W. 879.

Water works. *Western New York Water Co. v. Whitehead*, 160 N. Y. S. 1020, 97 Misc. Rep. 57, affirmed in 162 N. Y. S. 1149.

Sea wall to protect a city from tides and floods, held a public improvement. *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

Making and selling ice by the municipality, held not a public purpose, authorizing the issuance of bonds. *State ex rel. v. Orear*, 277 Mo. 303, 316-329, 210 S. W. 392.

³⁶ *Honnold v. Carter County Comrs. (Okla.)*, 177 Pac. 71; *Portland v. Albee*, 67 Ore. 221, 135 Pac. 897, 899, citing § 2270, vol. 5, ante; *Re Afton*, 43 Okla. 720, 144 Pac. 184.

Refunding bonds. *Finnup v. School District*, 94 Kan. 695, 146 Pac. 349.

Law authorized bond issue "for the purpose of funding the floating indebtedness and outstanding legal warrants of such city or town." Judgments against the town were held included in the words floating indebtedness. *Hayden Realty Co. v. Aurora*, 62 Colo. 563, 163 Pac. 843.

³⁷ *California. Hartigan v. Los Angeles*, 170 Cal. 313, 149 Pac. 590.

Kansas. State ex rel. v. Kansas City, 101 Kan. 806, 168 Pac. 907.

Kentucky. Kimbley v. Owensboro, 176 Ky. 532, 195 S. W. 1087.

Ohio. State ex rel. v. Cincinnati Street Ry. Co. (Ohio), 119 N. E. 735; *Cincinnati v. Puchta*, 94 Ohio St. 431, 115 N. E. 278.

Oklahoma. Re Afton, 43 Okla. 720, 144 Pac. 184.

Texas. Cohen v. Houston (Tex. Civ. App.), 176 S. W. 809.

Washington. Schooley v. Chelalis, 84 Wash. 667, 147 Pac. 410; *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331.

³⁸ *Crayton v. Charlotte*, 175 N. C. 17, 94 S. E. 689.

Whether debt limit provisions has been exceeded. *State ex rel. v. Hackmann*, 274 Mo. 551, 203 S. W. 960.

Specified kinds or classes of bonds may be excluded from restrictions as to indebtedness,³⁹ as paving bonds,⁴⁰ or bonds for necessary expenses, e. g., improvement of streets, waterworks, fire system, light plant and municipal buildings.⁴¹

III. FORM AND CONTENTS.

§ 2285. General rules.

Where the form of the bond is defective and is attacked before the bonds pass to bona fide holders, the issue may be set aside and a new issue ordered to be made in proper form.⁴²

§ 2287. Signature.

Admissions on the record "that the lithograph signature on the coupons are lithographic facsimiles of the signature" of the mayor and clerk of the municipal corporation issuing the bonds is an inference that the officers acted with due authority, and is the *prima facie* effect in an evidential sense. Bonds bearing the genuine signatures of the proper officers and the corporate seal establish a *prima facie* case of validity. The uniform rule is to treat the signature and the corporate seal as

³⁹ Debt limit provisions, held inapplicable to increase of indebtedness by bonds to improve water works. *Bain v. Goldsboro*, 164 N. C. 102, 80 S. E. 256.

Certain bond issue may be exempt from statutory debt limit provision, as independent bond-issuing power conferred to raise money by bonds to install filtration plant to comply with a state law. *State ex rel. v. Dean*, 95 Ohio 108, 116 N. E. 37.

⁴⁰ *Junction City v. Central National Bank*, 96 Kan. 407, 153 Pac. 28.

⁴¹ *Kingston v. Security Trust Co.*, 169 N. C. 207, 85 S. E. 399.

⁴² "It may be well that, if the bonds had been issued and were in the hands of bona fide holders they would be enforceable, though ostensibly based on the wrong statute. But where the form of the bond is attacked in limine, as in this case, the court should set it aside, if illegal in itself, to the end that the bonds when issued should recite their true basis." *Livermore v. Millville*, 82 N. J. Eq. 648, 90 Atl. 380.

importing authority so to execute the bonds, "and this, too, where the authority of the signatory officers has not appeared in the statute."⁴³

§ 2289. Provisions as to maturity of bonds.

Provisions of the applicable law as to the maturity of the bonds, to render them valid, must be followed.⁴⁴

Nor can such invalid bonds, it has been said, be ratified by council action or by vote of the electors.⁴⁵

Under a law providing that bonds shall be payable at such times and places as the council or other corporate authorities shall determine, if the charter does not establish a rule on the subject, the council may fix the time of maturity;⁴⁶ and in such case it has been held that even a charter provision cannot restrict the council's discretion in this respect.⁴⁷

⁴³ *Newbern v. National Bank*, 234 Fed. 209, 217, 148 C. C. A. 111.

The obligation imposed on a mayor and auditor to execute certain bonds, held to be ministerial, no discretion can be exercised and mandamus will lie to compel its exercise. *Portland v. Albee*, 67 Ore. 221, 135 Pac. 897, 899, approving § 2347, vol. 5, ante.

The city treasurer cannot justify his refusal to sign the bond upon the ground that the board of trustees may violate their duty by selling the bond for less than par. *Venice v. Lawrence*, 24 Cal. App. 350, 141 Pac. 406.

Where the bonds differed from those described in the ordinances and the difference is only in relation to the time when the bonds and interest thereon are made payable—a matter not material or necessary to be included in the call for election or other preliminary ordinance, the clerk cannot refuse

to sign the same. The clerk's refusal to countersign was an omission to perform a plain, ministerial duty devolving upon him by law and it may be compelled by writ of mandate. *Oxnard v. Bellah*, 21 Cal. App. 33, 130 Pac. 701.

⁴⁴ *McAndrew v. Dunmore Borough*, 254 Pa. 101, 91 Atl. 237; *Simpson v. Nacogdoches* (Tex. Civ. App.), 152 S. W. 858.

⁴⁵ *Geneva v. Fenwick*, 145 N. Y. S. 884, 159 App. Div. 621.

⁴⁶ *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239.

Provisions as to maturity of bonds, held sufficient. *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410.

Maturity date fixed by council resolution. *McCarthy v. McElvaney* (Tex. Civ. App.), 182 S. W. 1181, 1183.

⁴⁷ "The fixing of the maturity of the bonds is thus distinctly left to the discretion of the common

§ 2291. Provisions for payment before issuance of bonds.⁴⁸

The usual provision is that no indebtedness shall be incurred or renewed, or bonds issued unless provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest and to provide a sinking fund for the final payment of the debt or redemption of the bonds at maturity.⁴⁹

council or other corporate authorities of the city. That discretion being vested in the council by general state law cannot be controlled or circumscribed by any charter provision. This as a governing principle in such cases is too thoroughly established by the decisions of this court to be open to question." *Shorts v. Seattle*, 95 Wash. 538, 164 Pac. 241.

⁴⁸ *California. Calistoga v. Adams* (Cal. App.), 172 Pac. 624.

Georgia. Sewell v. Tallapoosa, 145 Ga. 19, 88 N. E. 577, 580, 581.

Kentucky. Barry v. New Haven, 162 Ky. 60, 171 S. W. 1012; *Parker v. Corbin*, 149 Ky. 603, 149 S. W. 970.

New Jersey. Livermore v. Millville, 82 N. J. Eq. 648, 90 Atl. 380.

New York. Lyon v. Binghamton, 145 N. Y. S. 424, 160 App. Div. 222.

Washington. Washington-Oregon Corporation v. Chehalis, 76 Wash. 442, 136 Pac. 681.

Wisconsin. Jones v. Racine, 155 Wis. 1, 143 N. W. 707.

See § 2173, ante; §§ 2173, 2174, vol. 5, ante.

In the issue of bonds to raise money to build a sea wall, by special assessment on property to be benefited, unless the city is primarily liable for the entire

amount, with right to reimburse itself by special assessment, the notice, hearing, etc., should be made before the bonds are issued. *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

⁴⁹ A tax within the limitations of the law sufficient to provide a sinking fund and interest on the bonds must be levied by the proper authorities. *State ex rel. v. Dean*, 95 Ohio 108, 116 N. E. 37.

Law provided how price of waterworks should be paid, that a sinking fund should be created by an annual tax, "of at least one-fortieth part of the entire bonded debt," and the ordinance provided for such tax, but used the qualifying words "if necessary." Held, ordinance was a sufficient compliance with the law, that it by implication directed the collection of as much as should be necessary for the purpose named, that the words at most are but surplusage. *Enterprise Real Estate Co. v. Charleston*, 107 S. C. 492, 93 S. E. 184.

No provision was made for the levy of a special tax to pay the interest on the bonds or for the creation of a sinking fund for their ultimate redemption. "The city has the undoubted right to pay the interest out of its general

Such provision is mandatory; ⁵⁰ and the corporate authorities should conform strictly to the constitutional and legislative requirements under which they act in safeguarding the interests of the municipality.⁵¹

§ 2292. Place of payment.⁵²

§ 2293. Date.

The general rule is that, "although a bond be erroneously dated or bear no date, its validity will not be affected if all the essentials necessary to give it legal and binding force have been complied with."⁵³

§ 2294. Medium of payment.⁵⁴

revenues, if they are sufficient, but its authorities could not exceed the limitations of taxation fixed in the charter without special permission from the General Assembly." It appeared that the present revenues of the city were sufficient to pay the city's expenses, the interest on the bonds, and eventually to create a sinking fund; "but a bond issue of a city or town for necessary municipal expenses, duly authorized by legislative enactment, is not invalid because, at the present rate of taxation an insufficient revenue is obtained for a sinking fund to pay the annual interest." *Gastonia v. Citizens' National Bank*, 165 N. C. 507, 81 S. E. 755.

⁵⁰ *Link v. Karb*, 89 Ohio 326, 104 N. E. 632; *Cincinnati v. Harris*, 91 Ohio 151, 110 N. E. 468.

⁵¹ In the absence of a requirement that the bonds shall have been first issued before the legislation providing for the levy of taxes for the purposes stated shall be enacted, the matter is left to the

discretion of the legislative body empowered to act for the municipality. *State ex rel. v. Zangerle*, 95 Ohio 58, 115 N. E. 511.

⁵² *Lasseter v. State*, 67 Fla. 240, 64 So. 847.

⁵³ *State ex rel. v. Hackman*, 273 Mo. 670, 202 S. W. 7, 16.

⁵⁴ One section of the law provided that the principal interest of the bonds shall be payable in "gold coin of the United States of the present standard of weight and fineness." The fact that the section of the law containing the form of the bond provided that the principal and interest shall be payable in gold coin, is not important. The sections do not conflict but must be construed together. When gold coin is mentioned in the section as to form it necessarily means the kind of gold coin described in the other section. *Lasseter v. State*, 67 Fla. 240, 64 So. 847.

Bonds issued to pay for local improvements expressly made pay-

§ 2295. Denomination.⁵⁵

IV. ISSUANCE, DELIVERY AND CONDITIONS PRECEDENT.

§ 2297. Time for issuance, and when deemed "issued."

A favorable vote by the electors for a bond issue for a hospital in 1908, was held sufficient to authorize the issuance in 1919, irrespective of a change of the municipal government in the interim from the aldermanic to the commission form.⁵⁶

§ 2299. Proceedings before issuance of bonds.⁵⁷

As valid bonds can be issued only in the manner prescribed by law,⁵⁸ all mandatory requirements as to procedure must be followed.⁵⁹

able only out of a local improvement fund are payable out of that fund only. The city cannot be required to pay the bonds out of any other fund and then proceed to reimburse itself by enforcing the collection of the assessments. *State ex rel. v. Tacoma*, 97 Wash. 190, 166 Pac. 66.

Bonds were made payable alone by special assessments; held if the city fails to collect the assessments when due the holder of the bonds, by statute, may do so and may seek to foreclose the assessment liens. *First National Bank v. Weiser*, 30 Idaho 15, 166 Pac. 213.

⁵⁵ The denomination prescribed by the applicable law is to be observed. *Seyboldt v. Ranier*, 130 Md. 69, 99 Atl. 960.

Denomination fixed by council resolution. *McCarthy v. McElvaney* (Tex. Civ. App.), 182 S. W. 1181, 1183.

⁵⁶ *Stokes v. Montgomery* (Ala. 1919), 82 So. 663, 667, quoting with approval from § 2297, vol. 5, ante.

⁵⁷ *Oxnard v. Bellah*, 21 Cal. App. 33, 130 Pac. 701; *C. W. Smith Electric & Ice Co. v. Larned*, 96 Kan. 33, 149 Pac. 704; *Barry v. New Haven*, 162 Ky. 60, 171 S. W. 1012.

⁵⁸ A requirement of a prior levy was held not limited to debts and liabilities which are not evidenced by specifically authorized bonds. Hence, under such provisions, water and light bonds may be issued without a prior levy in anticipation of their payment. *Backus v. Virginia*, 123 Minn. 48, 142 N. W. 1042.

See § 2291, ante.

⁵⁹ *Brownfield v. Kearney*, 94 Neb. 419, 143 N. W. 475; *Burwell v. Lillington*, 171 N. C. 94, 87 S. E. 970.

The proceedings as to the steps to issue must be observed in all essential respects, as the enactment of the ordinance, etc. *Hartzler v. Goodland*, 97 Kan. 129, 154 Pac. 265.

Where bonds are issued without

An ordinance or resolution duly enacted by the legislative body is often essential.⁶⁰

§ 2301. Same—election as condition precedent to authority to issue bonds.⁶¹

Apart from constitutional limitations, the legislature has plenary power over municipalities and the issue thereby of bonds for municipal purposes, and can authorize a city or town to issue bonds for a legitimate municipal purpose without submission of the question to the electorate of such municipality.⁶²

legislative authority, as failure to enact an ordinance, they are void. *Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109.

The procedure whether directed by ordinance or resolution for the purpose of calling an election are to be observed, and all provisions of the law and different acts relating to the subject are to be construed together. *Crayton v. Charlotte*, 175 N. C. 17, 94 S. E. 689.

⁶⁰ *Heffner v. Krinn*, 98 Ohio 1, 120 N. E. 221.

Ordinance calling election is sufficient if it complies with the law as to information to electors. *Humphrey v. Pratt*, 93 Kan. 413, 144 Pac. 197.

An ordinance for issue of improvement bonds is presumed valid, that it observed the law and was regularly enacted. Law precluded questioning validity after expiration of twenty days and thereafter the presumption as to validity is conclusive. *Dale v. Bayhead Borough*, 90 N. J. L. 49, 100 Atl. 329.

Ordinance to issue bonds may be proposed by initiative petition and question submitted to electors.

Heffner v. Krinn, 98 Ohio 1, 120 N. E. 221.

Resolution of council as to advisability of issuing bonds for purposes specified, prior to election, held sufficient. *McCarthy v. McElvaney* (Tex. Civ. App.), 182 S. W. 1181.

A council resolution authorizing an issue of bonds is not invalid because passed before the final order, authorizing the improvement, was approved by the mayor or published. *Williams v. St. Paul*, 123 Minn. 1, 142 N. W. 886.

Resolution as to denomination of bonds, rate of interest and date of maturity, held sufficient. *McCarthy v. McElvaney* (Tex. Civ. App.), 182 S. W. 1181, 1183.

⁶¹ *Heidelberg v. Batson* (Miss. 1919), 81 So. 225.

See § 2195, ante.

⁶² *Camp v. State*, 71 Fla. 381, 386, 72 So. 483; *Middleton v. St. Augustine*, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227.

Bonds for public improvements payable out of special assessments usually may be issued without such approval. *Portland v. Albee*, 67 Ore. 221, 135 Pac. 897.

Bonds for street improvements,

Under some laws, in submission to the electorate, the proposition should show the time the bonds are to run and the interest thereon in clear and unmistakable terms, otherwise they will be void.⁶³

Unless the applicable law so requires, failure to state in the proposition submitted to the voters how it was proposed to create a sinking fund for the payment of the principal and interest of the bonds will not invalidate them.⁶⁴

So omission of directory provisions as the fixing of the date, form and maturity of the bonds prior to the election to obtain authorization therefor will not render them void.⁶⁵

without a vote of electors. *Imboden v. Bristol*, 132 Tenn. 562, 179 S. W. 147.

Express power to issue bonds by council without vote of electors to raise money for extension of lighting plant, payable out of a special fund established by ordinance. *Shorts v. Seattle*, 95 Wash. 538, 164 Pac. 241, 95 Wash. 531, 164 Pac. 239.

Bonds for necessary expenses need not be authorized by vote of electors. *Robinson v. Goldsboro*, 161 N. C. 668, 77 S. E. 948.

Vote required for authority to issue bonds to erect school buildings, since they are not necessary expenses of a municipal corporation. *Gastonia v. Citizens' National Bank*, 165 N. C. 507, 81 S. E. 755, following *Hallowell v. Borden*, 148 N. C. 256, 61 S. E. 638.

An election is not required to create a debt and issue bonds for streets, waterworks, sewers and electric lights, as these are necessary municipal expenses. *Gastonia v. Citizens' National Bank*, 165 N. C. 507, 81 S. E. 755.

May issue bonds for the erection of a market house without authorization by vote of electors, since under the applicable law this is a necessary expense. *LeRoy v. Elizabeth City*, 166 N. C. 93, 81 S. E. 1072.

⁶³ *State ex rel. v. Clausen*, 87 Wash. 111, 151 Pac. 251.

⁶⁴ "So far as submitting the proposition to the electors is concerned the law did not require it, and we may not say the bonds are void because something was not submitted to the tax paying electors that the law did not provide should be submitted." *Wheeler v. Denver*, 231 Fed. 8, 24, 145 C. C. A. 196.

⁶⁵ "The tax paying electors must be charged with a knowledge of this law, and when they voted the bonds they would be so charged with such knowledge. The question submitted to the tax paying electors was the question the law required to be submitted to them and that was sufficient." *Wheeler v. Denver*, 231 Fed. 8, 23, 145 C. C. A. 196.

Where electors are authorized to determine the amount of the bonds to be issued, this amount or the terms thereof cannot be varied thereafter by the municipal authorities.⁶⁶

§ 2302. Proceedings in court to determine validity of issue before sale.⁶⁷

Unless notice of the proceedings to validate bonds is given as prescribed the adjudication under the special statutory proceeding validating the bonds is unauthorized and may be disregarded by a chancellor in an equity suit to enjoin the issue of the bonds.⁶⁸

⁶⁶ Uhler v. Olympia, 87 Wash. 1, 152 Pac. 998.

⁶⁷ Re City of Lackawanna, 143 N. Y. S. 198, 158 App. Div. 263; Camp v. State, 71 Fla. 381, 72 So. 483; Lasseter v. State, 67 Fla. 240, 64 So. 847; Durrence v. Statesboro, 147 Ga. 175, 93 S. E. 88; Murray v. Tifton, 143 Ga. 301, 84 S. E. 967; Ray v. Lavonia, 141 Ga. 626, 81 S. E. 884.

Proceedings to determine the constitutionality of, and to construe a legislative act authorizing a named city to issue bonds in an amount specified for streets, sidewalks and highway improvements, graded schools, waterworks, sewerage and electric lights. Purchaser of bonds is held to have full knowledge of the terms of the legislative act under which the bonds were issued, as well as of the charter of the city, its revenues and ability to pay. Gastonia v. Citizens' National Bank, 165 N. C. 507, 81 S. E. 755.

In proceedings for the validation and confirmation of certain bonds issued or to be issued to secure funds necessary for pub-

lic improvements, the question whether there was irregularity in the organization of the municipality cannot be determined in a collateral attack of this character. Merrell v. St. Petersburg (Fla.), 76 So. 699.

In an action to validate bonds an allegation that the municipal authorities do not contemplate or intend to use the proceeds of any of the bonds for the purchase of a site, but contemplate and intend to use the proceeds thereof, or so much as may be necessary, for the erection of an auditorium on a site already owned by them, does not furnish ground for a refusal to validate bonds which have been authorized by an election for the purpose of selecting a site and erecting an auditorium. If the public authorities should seek to use in an unlawful manner, or for an unlawful purpose, the proceeds of the bonds thus authorized the remedy is not by a refusal to validate the bonds for the purpose for which they are authorized. Gracen v. Savannah, 142 Ga. 141, 82 S. E. 453.

On proceeding for validation, a judgment refusing to validate the bonds, not being based on the invalidity of the bonds, was held not the equivalent of a judgment declaring them illegal. Bonds may be valid and binding notwithstanding a refusal of the court to confirm and validate.⁶⁹

V. SALE OR OTHER DISPOSITION OF BONDS.

§ 2303. Disposition of bonds.

If discretion is given to the municipal authorities as to the sale of the bonds, it is competent for the city to deliver them to a contractor as payment for public work at par, since this is a sale.⁷⁰

If the applicable law contains no provision as to the disposition of the bonds, the proper corporate authorities may regulate the same, and interest thereon.⁷¹

A contract with the municipality to buy bonds "if legal to the satisfaction of our counsel," is conditional on the opinion of such counsel that the bonds are legal. If in good faith the opinion is given that they are invalid, irrespective of the true fact, the purchase need not be consummated.⁷²

The city's offer to sell bonds provided: "all bids to be subject to the legality of the issue." The bank's bid recited: "subject to approval as to legality." Here it was held that the bank did not make a counterproposition; that the qualifying condition was the same in both the offer and the bid; and that if the issue was valid

⁶⁸ *Miami v. Romfh*, 66 Fla. 280, 63 So. 440.

⁶⁹ *Harrell v. Whigham*, 147 Ga. 558, 94 S. E. 994; *Tyson v. McIntosh County*, 147 Ga. 233, 93 S. E. 407.

⁷⁰ *Washington-Oregon Corporation v. Chehalis*, 76 Wash. 442, 136 Pac. 681, 683, citing § 2303, vol. 5, ante.

Bonds may be awarded to a private purchaser. *Portland v. Albee*, 67 Ore. 221, 135 Pac. 897.

⁷¹ *Paine v. Seattle*, 70 Wash. 294, 126 Pac. 628, 636.

⁷² *United States Trust Co. v. Guthrie*, 181 Iowa 992, 165 N. W. 188.

the bank was to be bound; if not, the bank was to be relieved.⁷³

The purchasing of an entire bond issue by a bank at a stipulated price, and the bank afterwards selling the bonds to its patrons, making no report of such sales to the city, was held a sale and purchase outright.⁷⁴

Funds derived from the sale of bonds cannot be used to pay any debts contracted prior to the election at which the bonds were voted. "The bonds were not voted for the purpose of paying an existing debt of the city."⁷⁵

§ 2304. Sale at less than par.⁷⁶

Where a contractor is required to accept improvement bonds at their par or face value, the payment by the city of bonds at a discount, or of bonds with earned interest added as a premium, is a payment made without authority and in violation of law, and is in effect a void payment.⁷⁷

⁷³ Junction City v. Central National Bank, 96 Kan. 407, 153 Pac. 28.

Proposition to purchase, when complete. State ex rel. v. Sapulpa (Okla.), 160 Pac. 489.

Right to rescind contract for bonds wherein the valuation of the property of the municipality for assessment purposes, and the limit thereof, permitting in such investments by banks that were prospective purchasers, were in question. Omaha v. Venner, 243 Fed. 107, 155 C. C. A. 637.

⁷⁴ Bay City v. Lumberman's State Bank, 193 Mich. 533, 160 N. W. 425.

⁷⁵ Simpson v. Nacogdoches (Tex. Civ. App.), 152 S. W. 858, 862, 863.

⁷⁶ Hill v. Seattle (Wash. 1919), 185 Pac. 631, following Kiernan v. Portland, 61 Ore. 398, 122 Pac.

764, Ann. Cas. 1994B, 255 (set out in notes to § 2304, vol. 5, ante), also Paine v. Port of Seattle, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580, and Uhler v. Olympia, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998.

Sale at par. LeRoy v. Elizabeth City, 166 N. C. 93, 81 S. E. 1072.

⁷⁷ "Such payment is not to be considered as one voluntarily made by those assuming to act for it without authority, and does not estop the municipality from recovering such payment. Nor does the failure of the city to deduct the accrued interest at the time of the delivery of the bonds vest any right in the contractor to this accrued interest, or estop the city from asserting the unlawfulness of the procedure." State ex rel. v. Seattle, 74 Wash. 438, 133 Pac. 1005, distinguishing Seattle v.

"The bond, when issued in conformity to existing laws, is a commodity or commercial paper to be bought at its price or to be let alone. * * * The statute does not assume to fix a maximum rate of interest, and permit the issuance of the bonds at a lesser rate, leaving the difference as a zone for exploitation, out of which a city council, can give the buyer or broker his commissions, attorney's fees and other expenses." ⁷⁸

Under a law requiring bonds to be sold at par, commissions paid to a purchaser, it has been held, constitute in substance and effect a discount in violation of law. In such case the doctrine of estoppel has no application inasmuch as the payment not only was unauthorized, but in violation of the express provisions of the statute. ⁷⁹

In order that bonds should "net the city not less than their par value, with accrued interest to the date of payment of the proceeds into the city treasurer," as expressly required by law, it is clear that no expenses can be deducted from that sum, neither commissions and attorney fees, nor any other expense of any nature connected with the issuance and sale of the bonds. ⁸⁰

But in such case necessary expenses for the issuance and sale of the bonds, including commissions and attorney fee, it has been held, may be paid out of the general funds of the municipality. ⁸¹

Stirratt, 55 Wash. 560, 104 Pac. 834, 24 L. R. A. (N. S.) 1275.

⁷⁸ Spear v. Bremerton, 90 Wash. 507, 156 Pac. 825, 827, declining to sustain the sale of bonds below par in order to produce a higher rate, and a better market, stating that such proposal offends the law and would not be sanctioned by the court; that no evasion of the law or subterfuge will be tolerated.

⁷⁹ Bay City v. Lumberman's State Bank, 193 Mich. 533, 160 N. W. 425, 428.

⁸⁰ Davis v. San Antonio (Tex. Civ. App.), 160 S. W. 1161, 1164.

See Evans v. Tillman, 38 S. C. 238, 17 S. E. 49; Commonwealth v. Williamstown, 156 Mass. 70, 30 N. E. 472.

⁸¹ "These expenses must necessarily be paid out of some public funds, or the bonds cannot be sold. * * * The legislature has not attempted to interfere with the power of the city council to use the general fund for what may be deemed by it to be legitimate necessary, current expenses." Davis v. San Antonio (Tex. Civ. App.), 160 S. W. 1164, 1165, holding that under the charter involved the

VI. NEGOTIABILITY AND RIGHTS OF TRANSFEREES.

§ 2305. Negotiability of bonds.⁸²

VII. ESTOPPEL AND RATIFICATION.

§ 2309. When municipality bound by ratification or estoppel.

As to ratification and estoppel, there is a vital distinction between the entire want of power to issue the bonds involved which no act of the municipality or quasi municipality may remedy and the total failure to exercise or the imperfect exercise of lawful authority. The former cannot be affected by the doctrine of equitable estoppel or by the estoppel of recitals or certificates, or of record, but the latter may be.⁸³

council could employ agents to sell the bonds on commission, and an attorney to pass upon the legality of the bonds.

⁸² The statute under which the bonds were issued provided: "such bonds shall be negotiable as inland bills of exchange, and shall be free from all defenses of any property owner." The statute intended to make the bonds possess all of the characteristics of negotiable paper, and went further and stamped the bonds with the characteristics of negotiable paper. "Moreover, these bonds possess all of the characteristics of a negotiable instrument. They are made payable to bearer and title thereto passes by delivery, and whatever may be the adjudication of other courts under totally different statutes, we unhesitatingly conclude that these bonds are negotiable instruments, and that a bona fide holder of them before maturity for value, and without notice, is entitled to

all of the protection which the law throws around the holder of such instruments." *Citizen's Trust & Guaranty Co. v. Hays*, 167 Ky. 560, 180 S. W. 811, 814.

⁸³ *Aurora v. Gates*, 208 Fed. 101, 104, 125 C. C. A. 329.

Section 2334, vol. 5, ante.

The bonds involved contained no recitation or certification by the municipal or other officers that they were issued in conformity with either the constitution or laws of the state, or with any ordinance of the city authorizing their issue. In fact they were not city bonds at all but bonds of a private corporation containing no certification whatever as to the regularity or legality of their issuance. They were the bonds of a private corporation operating the municipal water works. "Of course, all holders must have notice that the bonds are not primarily obligations of the city. If, therefore, bonds containing no recital or certification

§ 2310. Curative statutes.⁸⁴

The principle is very generally recognized that "when defects and irregularities are by reason of the violation or nonobservance of statutory provisions, and unless vested rights have supervened the objections may be removed and the measure validated by proper legislative action."⁸⁵ Bond issues may be ratified and declared to be valid obligations by a vote of the people in amending the constitution, and in such case, if vested rights are not affected, the courts are prohibited from entertaining any contest wherein their validity or constitutionality is questioned.⁸⁶

to the effect that they were authorized and issued in pursuance of law and the ordinances of the municipality do not estop the municipality to controvert their validity for want of power to authorize their issuance, the obligations being the bonds of the city itself, by how much stronger reason would the municipality not be estopped to controvert the validity of bonds not of its issuance but secured by mortgage upon the city's property, which mortgage as security the city was without power to authorize or to execute? We think that the city's contention that the plaintiffs are not the owners and holders of these bonds for value and without notice of their infirmity is sound, and that they must be deemed to have taken them with full notice of the want of power in the city to authorize their issuance or to secure the same by mortgage upon its property." *Santa Cruz v. Wykes*, 202 Fed. 357, 370, 120 C. C. A. 485.

"The rule is laid down without qualification that where municipal bonds are issued without authority,

as distinguished from an issuance under authority but without a compliance with the requirements of the statute, they are absolutely void, and can acquire no validity in the hands of a bona fide holder." *Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109, 1119, applying the rule to case where bonds were issued without a valid ordinance authorizing their issue. See *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329.

Subsequent payment of interest on void bonds will not have the effect of ratifying them to the extent that they will be thus validated. *Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109, 1116, 1117.

⁸⁴ *Pascagoula v. Delmas*, 108 Miss. 91, 66 So. 329; *Thompson v. Hance*, 174 Cal. 572, 163 Pac. 1021; *Spear v. Bremerton*, 95 Wash. 264, 163 Pac. 741.

⁸⁵ *Kingston v. Security Trust Co.*, 169 N. C. 207, 85 S. E. 399.

⁸⁶ "The people of the state by their vote had the right to ratify bond issues by a subdivision of the state and to declare them valid obligations and to compel the pay-

VIII. BONA FIDE PURCHASERS.

§ 2313. Definition and effect of status.⁸⁷§ 2314. Purchaser from a bona fide purchaser.⁸⁸

"The law is well settled that a purchaser before maturity, even with notice from a bona fide purchaser for

ment of all just debt owing by municipalities and other similar bodies, even if the evidence of indebtedness were not in all respects regular, where it is shown that such subdivision of the state has received compensation for such evidences of indebtedness." *Badger-Louisiana Land Co. v. Estobinal (La.)*, 79 So. 335.

⁸⁷ *Truman v. Harmony*, 205 Fed. 549, 553.

Innocent purchaser for value before maturity. *Laredo v. Frishmuth (Tex. Civ. App.)*, 196 S. W. 190.

Evidence in particular case as to whether a bond holder was a purchaser in good faith. *Dinet v. Rapid City*, 222 Fed. 497, 138 C. C. A. 93.

County held liable to a bona fide purchaser for value before maturity for interest accrued where it delivered the bonds without receiving accrued interest. It was within the power of the county to decline to deliver the bonds to the bidder until full payment was received. *Beiser v. Supervisor's Dist.*, 114 Miss. 842, 75 So. 594.

"It is a well settled rule of law that where a municipal corporation has power to issue bonds upon a compliance with certain prerequisites and the bonds are issued, they are prima facie valid obligations, and as against a bona fide

purchaser, the burden of proving want of performance of any of the prerequisites is upon the municipality." *Cook v. Socorro*, 24 N. M. 202, 165 Pac. 341.

⁸⁸ The usual provision is that "to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." "The requirements of the statute as to notice is a wise one. The business of the court and its commercial transactions are largely carried on by the use of commercial paper, and the necessities of trade and commerce demand the persons dealing in them shall have their rights guarded and protected unless they are forfeited in the manner pointed out by the law. It is therefore against the policy of the law, and has been for centuries, to permit slight and non-consequential circumstances, creating only a remote and chimerical suspicion, to hamper the activities and usefulness of such commercial paper in business activities."

Therefore, under such law where the purchaser of the bond had no knowledge of any fraudulent purpose, or attempted fraudulent pur-

value without notice will be protected against prior equities.”⁸⁹

§ 2320. Same—matters of record.⁹⁰

§ 2321. Same—matters appearing upon face of bonds.⁹¹

IX. RECITALS IN BONDS.

§ 2329. Who may rely upon estoppel by recital.⁹²

§ 2331. Authority to make recitals.

When officers had power to decide as to whether all pose of agents relating to the disposition of the bonds, he was not negligent in failing to make necessary inquiries concerning the title which he had in the bonds. He is a bona fide purchaser of the bonds within the meaning of the law, and hence, is entitled to its protection. *Citizens' Trust & Guaranty Co. v. Hays*, 167 Ky. 560, 180 S. W. 811.

Bonds were purchased before maturity for value in the ordinary course of business and without notice of any infirmity therein. Question, whether purchaser as transferrer was a bona fide holder, since if he was, his title and right to enforce payment could not be impaired by restrictions placed upon his power of disposal. A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with defenses existing against the paper. That is the rule of the United States Supreme Court. “Where the evidence tends to prove that

in the ordinary course of business the purchaser bought the bonds for a valuable consideration, paying cash therefor, and without any notice of the manner in which the irrigation district had disposed of them or the consideration paid to it by the parties from whom he purchased, the evidence establishes that the purchaser at the time when he transferred the bonds to the present holder, the plaintiff in this action, was a bona fide holder thereof for value.” *Ham v. Grapeland Irrigation Dist.*, 172 Cal. 611, 158 Pac. 207, 210.

⁸⁹ *Citizens' Trust & Guaranty Co. v. Hays*, 167 Ky. 560, 180 S. W. 811.

⁹⁰ *Truman v. Harmony*, 212 Fed. (U. S. C. C. A.) 418, reversing 205 Fed. 549, 554.

⁹¹ Right of bona fide holder of refunding bonds of school district to recovery where the bond recitals were to the effect that all requirements of the law in their issuance had been observed. *Fin-nup v. School District*, 94 Kan. 695, 146 Pac. 349.

⁹² A bona fide purchaser of bonds is justified in acting upon the re-

essential conditions as to issuance of the bonds had been fulfilled, recitals to this effect in the bonds estop the municipality from denying the performance of such conditions to defeat their validity.⁹³

“Where, by legislative enactment, authority has been given to the officers of a municipality to issue its bonds on some precedent conditions, and where the facts may be gathered from the enactment that those officers were invested with power to decide whether or not that condition had been complied with, their recital in the bonds issued by them that it was fulfilled is duly authorized, and it estops the municipality or quasi-municipality from proving its falsity to defeat the bonds in the hands of an innocent purchaser.”⁹⁴

Thus a municipality, quasi-municipality, or a corporation and its officers, who by the apparent legality of their obligations or by recitals of their validity have induced innocent purchasers to invest in them are estopped from denying their legality on the ground that in some of the preliminary proceedings which led to the execution, or in their execution itself, they failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have lawfully complied, but which they carelessly disregarded.⁹⁵

Usually where the duty is placed upon a municipal officer, as the mayor to issue the bonds, he will be deemed to have had the authority to make the recitals in them.⁹⁶

§ 2334. Effect of recital where no power to issue bonds.

If the bonds contain no sufficient recital as to their issuance in conformity with the constitution, laws or

citals in the bonds and the municipality is bound by them. *Laredo v. Frishmuth* (Tex. Civ. App.), 196 S. W. 190.

⁹³ *Aurora v. Gates*, 208 Fed. 101, 108, 125 C. C. A. 329.

⁹⁴ *Aurora v. Gates*, 208 Fed. 101,

108, 125 C. C. A. 329, per Sanborn, C. J.

⁹⁵ *Aurora v. Gates*, 208 Fed. 101, 108, 109, 125 C. C. A. 329, per Sanborn, C. J.

⁹⁶ *Laredo v. Frishmuth* (Tex. Civ. App.), 196 S. W. 190.

ordinances, or if the issuance is beyond the power of the municipality to authorize, it is not estopped to controvert their validity. The doctrine is applicable in cases where bonds have been issued in excess of constitutional or legislative authority.⁹⁷

Knowledge of the provisions of the statute by authority of which bonds were issued must be imputed to every purchaser of municipal bonds. And where such statute requires a valid ordinance as authority to the officers to issue the bonds, without such ordinance, bonds issued are void even in the hands of bona fide purchasers, irrespective of recitals therein.⁹⁸

§ 2335. Recitals contrary to matters of record.⁹⁹

§ 2336. Recitals as to ordinances, resolutions, or orders of court.

“It is settled law that recitals in municipal bonds to the effect that they are issued in pursuance of and in

⁹⁷ *Santa Cruz v. Wykes*, 202 Fed. 357, 370, 120 C. C. A. 485.

⁹⁸ *Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109, 1120-1122.

Recital in bonds do not create an estoppel on the part of the municipality in case where an ordinance is necessary to confer authority upon the officers of the city to issue the bonds and where there is no such ordinance or the ordinance is found to be void. *Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109, 1116, 1117, 1120-1122. *Contra*, *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329; set out in § 2339, post.

⁹⁹ “The proposition that purchasers of the bonds should have read the record of ordinances to ascertain whether the ordinance recited in the bonds had been altered or repealed cannot be entertained for a moment.” The

holder had a right to rely on the assurances of the city that the bonds had been issued under a certain ordinance and the city cannot be heard to insist that they should have doubted the recitals of the bonds and have made inquiry as to the repeal or alteration of the ordinance. The purchasers were under no obligation to go further than the ordinance referred to, and as the money had been obtained by the city and used for permanent improvement, occupied and employed by the city, it is in equity and good conscience, estopped from setting up the plea that it had in a subsequent ordinance repealed or amended the ordinances which it had represented was in full force when the bonds were sold. *Laredo v. Frishmuth* (Tex. Civ. App.), 196 S. W. 190.

conformity with statutes and ordinances authorizing their issue operates as an estoppel to the municipality to deny that they were so issued.”¹

§ 2339. Recitals as estoppel to deny compliance with conditions.

The rule in the Eighth Judicial Circuit has been stated to be that a municipality or quasi-municipality may not, by the recitals or certificates in its bonds, estop itself from denying that it is without power to issue them when the laws are such that there can be no state of facts or of circumstances under which it would have authority to emit them. But if the laws are such that there might under any state of facts or of circumstances be lawful power in the municipality or quasi-municipality to issue its bonds, it may, by recitals therein, estop itself from denying that those facts or circumstances exist and that it had lawful power to send them forth unless the constitution or act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances.²

In that circuit, therefore, the proposition is established that the recital in municipal bonds that they were issued in accordance with the provisions of an enabling statute imports that they were sent forth in pursuance of a lawful and proper resolution or ordinance and of just and proper action by the governing board of the municipality. It relieves the innocent purchaser of all inquiry, notice, or knowledge of the record, action, or omission of the municipal board or council or of the other officers of the municipality and estops the municipality from denying

¹ *Santa Cruz v. Wykes*, 202 Fed. 357, 368, 120 C. C. A. 485.

Point that there was a failure to publish the ordinance authorizing the bond issue raised by the municipality was denied as against an innocent holder because of recital that everything required by

law had been done. *Aurora v. Gates*, 208 Fed. 101, 105-107, relying on *Evansville v. Dennet*, 161 U. S. 443.

² *Aurora v. Gates*, 208 Fed. 101, 104, 125 C. C. A. 329, per Sanborn, C. J.

that a lawful resolution or ordinance was passed and proper action was taken.³

³ *Aurora v. Gates*, 208 Fed. 101, 106, 107, 125 C. C. A. 329, per Sanborn, C. J., commenting the opinion runs: "It is true that before the decision of the Supreme Court in *City of Evansville v. Dennett*, 161 U. S. 434, 441, 443, 446, 16 Sup. Ct. 613, 40 L. ed. 760, this court fell into the error in *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 104, 105, 4 C. C. A. 212, and in *Hinkley v. City of Arkansas City*, 69 Fed. 768, 773, 16 C. C. A. 395, of holding that a recital or certificate that all preliminary steps had been taken or all precedent conditions had been fulfilled under which the bonds were issued, would not estop a quasi-municipality from defeating its bonds by proof that no ordinance required by the statute had been passed or published; and in *Town of Fletcher v. Hickman*, 165 Fed. 403, 91 C. C. A. 353, this court said, citing the *Granada Case*, that counsel in the *Hickman Case* assumed that the publication of the ordinance was a prerequisite to the validity of the bonds and held that the ordinance was duly published. But as this court and the Supreme Court had repeatedly declared, that has never been the law since the decision in 1895, of *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. ed. 760, by the Supreme Court of the United States. In that case the city's charters empowered the city to issue the bonds on condition that a petition of two-thirds of the resi-

dent freeholders of the city was presented to the city council praying it to subscribe for the stock for which the bonds were issued, and no such petition was ever made. A void amendment to the city's charter by its terms authorized the city to issue the bonds on condition that a majority of the qualified electors of the city, who were also taxpayers, voted in favor of the subscription for the stock for which the bonds might be issued. The bonds were issued under the void amendment, and some of them containing a recital that they were issued by virtue of the city charters and by virtue of the void amendment which was specified by the date of its passage, and by virtue of the resolution of the city council ordering an election which resulted in a legal majority in favor of the subscription to the stock, and by virtue of a resolution ordering the issue of the bonds. The Supreme Court first declared that the recital that the bonds were issued by virtue of the city charter was equivalent to a declaration that everything had been done that was required to be done in order that the power to issue the bonds granted by the charters might be lawfully exercised, and then said: 'As, therefore, the recitals in the bonds import compliance with the city's charters, purchasers for value, having no notice of the nonperformance of the conditions precedent, were not bound to go beyond the statute conferring the

A bona fide holder of bonds of an irrigation district, having no notice of the irregularity in disposing of them

power to subscribe and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had in fact been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature.' *Evansville v. Dennett*, 161 U. S. 443, 16 Sup. Ct. 617, 40 L. ed. 760.

"By the same mark the purchasers of the bonds of this town were not bound to inquire whether the requisite ordinance had been passed or whether or not it had been published. They had the right to assume that it had been duly passed and lawfully published in reliance upon the certificate in the bonds that 'all acts, conditions, and things requisite to be done precedent to and in the issuing of said bonds have been done, happened, and performed in regular and due form as required by law.' The petition to the city council praying that it subscribe stock by two-thirds of the resident taxpayers was as essential to the power of the city of Evansville to issue its bonds under its charters as the publication of the ordinance was to the power of this town to issue those in suit, for the charter of Evansville expressly prohibited the subscription to the stock which conditioned the city's power to issue the bonds in these words:

"'Provided that no stock shall be subscribed or taken by the com-

mon council in any such company, unless it be on the petition of two-thirds of the residents of such city who are freeholders of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed.' * * *

"In the year 1900 in *Hughes County v. Livingston*, 104 Fed. 306, 316, 43 C. C. A. 541, 551, this court declared that this proposition had been repeatedly affirmed and that it was no longer open to debate, citing *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 10 C. C. A. 637, 651; *Rathbone v. Board of Comrs.*, 83 Fed. 125, 131, 27 C. C. A. 477, 483; *City of South St. Paul v. Lampbrecht Bros. Co.*, 88 Fed. 449, 453, 31 C. C. A. 585, 589; *Board of Comrs. v. Heed*, 41 C. C. A. 668, 101 Fed. 768; *Wessen v. Saline County*, 73 Fed. 917, 919, 20 C. C. A. 227, 229. Since the decision in *Hughes County v. Livingston* the proposition has been reaffirmed by this court in *Independent School District v. Rew*, 111 Fed. 1, 7, 49 C. C. A. 198, 204, 55 L. R. A. 364, and in *Fairfield v. Rural Independent School District*, 116 Fed. 838, 840, 841, 54 C. C. A. 342, 344, 345.

"The opinion of the Court of Appeals of the state of Colorado in *Town of Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109, to the effect that this court has never overruled its decision in *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 4 C. C. A.

contrary to law, it was held in California, had a right and was entitled to rely upon the representation by way of recitals made in the bonds by the proper officers of the district, who were authorized to make the recitals, to the effect that they had fully complied with the provisions of the law, since it would be a fraud upon him to allow the district to plead the truth as against such recitals and consequently the district must be held to be estopped from so doing.⁴

212, and that the decision in that case is right and in harmony with the decision of the Supreme Court in *Evansville v. Dennett*, has received a careful reading and deliberate consideration but for the reasons stated in this opinion and in the other cases in this court cited, notably in *Hughes County v. Livingston*, 104 Fed. 306, 43 C. C. A. 541, and because the Supreme Court of the United States whose decisions it is our pleasure and duty to follow, still adheres to the views this court has expressed (*Quinlan v. Grand County*, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. ed. 860; *Presidio County v. Noel-Young Bond Co.*, 212 U. S. 58, 65, 29 Sup. Ct. 237, 53 L. ed. 402), this court is not persuaded that it is in error upon this subject and it declines to depart from the position it has maintained for more than a decade. The Town of Aurora cannot escape from the estoppel of its certificate in the bonds that all the acts required by its enabling statutes to be done before the issue of the bonds had been performed because an ordinance of its board which it might have published was required by those statutes to be published before the bonds were is-

sued and it omitted to publish it." *Aurora v. Gates*, 208 Fed. 101, 105, 106, 107, 125 C. C. A. 329, per Sanborn, C. J.

4 "The authorities seem to be uniform in holding that where a municipality has the power upon the performance of certain precedent conditions, to issue bonds, and its officers through whom it acts are charged with ascertaining and determining the facts which constitute such performance and certification on the face of the bonds to a compliance therewith, the municipality is estopped from pleading non-performance as a defense to such bonds in the hands of a bona fide holder thereof."

"Vested with this power to determine what constituted full compliance, and having so certified upon the face of the bonds, the district will not be heard as against a bona fide holder of bonds without notice of the alleged irregularity in the sale thereof, to say that the facts thus solemnly recited and upon which he innocently parted with his money are false. Purpose of estoppel is to conclude the truth in order to prevent fraud and falsehood. It is an admission or determination under circumstances of such solemnity

§ 2340. Same—rules applied to railway aid bonds.⁵

§ 2342. Recitals in funding and refunding bonds.⁶

X. PAYMENT.

§ 2344. In general.⁷

that the law will not allow the facts so admitted or established to be afterwards drawn in question between the same parties or their privies." *Ham v. Grapeland Irrigation Dist.*, 172 Cal. 611, 158 Pac. 207, 211, 212.

⁵ The rule of the United States Supreme Court is that where a statute confers power upon a municipal corporation, upon performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad and imposes upon certain officers the responsibility of the issuing of such bonds when certain conditions had been complied with, recitals by such officers that the bonds had been issued in conformity with the statute have been held, in favor of bona fide purchasers for value, to import full compliance with the statute and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. (*Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 45 L. ed. 760.) "The same principles no doubt govern when the question is not as to conformity with a statute, but as to conformity with a vote of the municipality imposing precedent conditions. But in order to enable a bona fide purchaser to invoke them, it must appear that the officers upon whose recital he relies were the officers

having authority to determine whether the conditions covered by their recital had been performed or not, and their recital must also have been such as would import compliance with the conditions in all substantial respects." *Harmony v. Truman*, 212 Fed. 4, 8 (U. S. C. C. A.), reversing 205 Fed. 549.

⁶ Recitals to the effect that all provisions of the law as to the issuance of school refunding bonds had been observed. *Finnup v. School District*, 94 Kan. 695, 146 Pac. 349.

⁷ Fund applicable to payment. *Oklahoma City v. Duhme*, 45 Okl. 75, 145 Pac. 408.

Payment of improvement bonds in installments, order of, under particular law. *Pittsburgh, C. C. & St. L. Ry. Co. v. Schmuck*, 181 Ind. 323, 103 N. E. 325.

Improvement bonds payable by special assessments relieves the city of primary liability. When the assessments are paid to the city, it becomes the custodian of the funds. It then becomes the duty of the city to apply such funds to the payment of the bonds, and on failure to do so, it becomes primarily liable. Nor will it be discharged from this obligation by misappropriation of the funds of a municipal officer. *Bloomington v. Citizens' National*

XI. REMEDIES.

§ 2346. Enjoining bond issue.⁸

The issue of bonds for a purpose not authorized by the law will be enjoined, notwithstanding a vote of approval by the electors.⁹

So if a proposed bond issue will increase the limit of indebtedness in violation of law, it may be enjoined.¹⁰

On the contrary, a bond issue will not be restrained on the ground that such contemplated action is against public policy;¹¹ nor for mere irregularities in the election conferring authority.¹²

Bank, 56 Ind. App. 446, 105 N. E. 575.

⁸ *Walters v. Bayonne* (N. J. Eq.), 104 Atl. 770; *Lyon v. Binghamton*, 145 N. Y. S. 424, 160 App. Div. 222; *Connolly v. Beason*, 100 S. C. 71, 84 S. E. 297; *Janes v. Racine*, 155 Wis. 1, 143 N. W. 707.

A private citizen who is a taxpayer is authorized to bring a suit to enjoin a proposed bond issue. The statute so permitted. *Hartzler v. Goodland*, 97 Kan. 129, 154 Pac. 265.

Denied as to bond issue for extension of a municipal lighting plant, where injunction was sought on the ground that the purpose of the municipality was an incident to the operating of such plant to permit the use of the electric current to generate power which purpose was alleged to be unlawful. *McDonald v. Ward* (Ala.), 77 So. 835.

⁹ Injunction will lie to restrain the effectuation of the issue of bonds, to the issuance of which the majority voting in the election had given approval, for a purpose not authorized by law. *Col-*

vin v. Ward, 189 Ala. 198, 66 So. 98.

Bonds voted for other purposes. *Beers v. Watertown* (S. D. 1920), 177 N. W. 502.

¹⁰ *State ex rel. v. Kansas City*, 101 Kan. 806, 168 Pac. 907.

Where the ground for injunction is exceeding the debt limit, the burden is on the complainant. *Bain v. Goldsboro*, 164 N. C. 102, 80 S. E. 256.

¹¹ Declined to enjoin bond issue on the ground of public policy where the legislature had authorized their issue. The question of policy involved is a legislative question pure and simple. There is no better criterion by which to determine any given question of public policy than the utterance of the state legislature upon that question. *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239.

¹² *Link v. Karb*, 89 Ohio 326, 104 N. E. 632.

De facto commissions acting in calling a bond election, held no ground for enjoining the bond issue, etc. *Humphrey v. Pratt*, 93 Kan. 413, 144 Pac. 197.

Unscrupulous campaign methods

If the application for an injunction is not made until the sale of the bonds has been consummated, the relief will be denied.¹³

Where notice of special statutory proceedings to validate bonds is not given as required an adjudication validating the bonds may be disregarded, in an injunction suit to enjoin the issue of the bonds.¹⁴

And so irrespective of the invalidity of the judgment validating the bonds the sale thereof will not necessarily be enjoined. The merits of the application must determine.¹⁵

And although in a validation proceeding there was a judgment refusing to validate the bonds an injunction may be denied, if the refusal to validate was not based on the invalidity of the bonds. Such judgment was held not the equivalent of a judgment declaring the bonds illegal, since they may be valid and binding notwithstanding.¹⁶

Under the Georgia statute if a judicial judgment validating a bond issue is not taken to the Supreme Court within the time prescribed, it can never thereafter be questioned in any court in the state, and hence a court should refuse an injunction against the bond issue.¹⁷

§ 2347. Mandamus to compel issuance of bonds.¹⁸

used in the election for a bond issue is no ground to enjoin issuance and sale of the bonds. *Humphrey v. Pratt*, 93 Kan. 413, 144 Pac. 197.

In proceeding to enjoin issuance of bonds pursuant to vote of the electors on ground that the election was not carried because it did not receive the requisite majority of votes, the burden of proving this fact is on the complainant. *Bauch v. Cabool*, 165 Mo. App. 486, 148 S. W. 1003.

Certification by the appropriate election officers that the voters consented to the bond issue pre-

cludes injunction to prevent their issuance. *Wilson v. Blaine* (Pa. 1918), 105 Atl. 555.

¹³ *Simpson v. Nacogdoches* (Tex. Civ. App.), 152 S. W. 858.

¹⁴ *Miami v. Romfh*, 66 Fla. 280, 63 So. 440.

¹⁵ *Durrence v. Statesboro*, 147 Ga. 175, 93 S. E. 88.

¹⁶ *Harrell v. Whigham*, 147 Ga. 558, 94 S. E. 994.

¹⁷ *Edwards v. Guyton*, 140 Ga. 553, 79 S. E. 195.

¹⁸ *Detroit v. Engel* (Mich. 1919), 173 N. W. 547; *Portland v. Albee*, 67 Or. 221, 135 Pac. 897, 899, approving § 2347, vol. 5.

§ 2348. Action on bonds to recover amount due.¹⁹**§ 2349. Remedies where bonds are invalid.**

A fundamental defect in the proceedings of incorporation of a municipality deprives such pseudo public corporation from issuing valid bonds upon which there can be any recovery.²⁰

Mandamus will lie to compel the authorities to issue the bonds and perform the duty imposed upon them by law. *State ex rel. v. Francisco*, 98 Kan. 808, 160 Pac. 217.

Mandamus to compel approval of re-funding bonds. *Laredo v. Head*, 246 Fed. 825.

Mandamus will not lie to compel a municipality to collect special assessment with which to pay improvement bonds where the bonds are so payable, if the bondholder has a plain, speedy and adequate remedy at law for the collection of any interest or principal due from the property owner who has failed to pay the assessments, which is provided by statute, and such remedy is exclusive. *First National Bank v. Weiser*, 30 Idaho 15, 166 Pac. 213.

Where different proposed issues of bonds are involved and separable, and some are legal and others illegal, court may rule accordingly. *Detroit v. Engel*, 187 Mich. 88, 153 N. W. 537.

Mandamus lies to compel the proper signing of a municipal bond. *Venice v. Lawrence*, 24 Cal. App. 350, 141 Pac. 406.

Mandamus will lie to compel appropriate officers to sign officially a valid bond issue. *State ex rel. v. Dean*, 95 Ohio 108, 116 N. E. 37.

¹⁹ Action on street improvement

bonds, change in law as impairment of obligation of contract. *Indianapolis v. Robison* (Ind.), 117 N. E. 861.

Statute giving bondholder right to proceed to collect assessments with which to pay bonds when they are so payable, provides that the bondholder shall have no claim against the municipality issuing the bonds, except for the collection of the special assessments made for the improvement for which the bonds were issued, but this remedy in case of non-payment is limited to the enforcement of such assessments. The bondholder can have no claim against the city on account of the debt created by the bond and he is given no right as against a taxpayer who has paid all of his assessments.

The remedy of bondholder in case a property owner fails to make payment of the taxes assessed against his property is not against the city nor the improvement district, nor against a person who has paid the sum due from him, but against the property of the delinquent. Where a remedy is given by statute which is exclusive, mandamus will not lie against the municipality. *First National Bank v. Weiser*, 30 Idaho 15, 166 Pac. 213.

²⁰ "We, therefore, have a case

Bonds issued in payment of stock in a railroad company without authority of law are void and no right as against the municipality issuing them can accrue under them; no action taken by the authorities of the city in regard to them can confer any right upon the holders. The levy and collection of taxes by the city to raise money to pay such bonds is without authority of law and the bond holders acquire no right to the amount collected. Such fund is held by the city subject to the right of the taxpayers to demand re-payment. The fact that the city authorities applied the fund to other purposes is no concern of the complainants, since no harm came to them by reason of the unlawful act of the city.²¹

where a town, affected by a fatal infirmity in its attempt to incorporate, issued bonds which by reason of such infirmity were adjudged to be void instruments, and where nevertheless it is now sought to recover upon the bonds in the absence of any statutory provision tending to show a legislative purpose to validate them or in any form to impose liability for their payment. Such legislative omissions cannot, of course, be supplied by a court." *Beyer v. Athens*, 249 Fed. 849, 855, relying on *Hays v. Holly Springs*, 114 U. S. 120, 126, 5 Sup. Ct. 785, 788, 29 L. ed. 81.

²¹ *Burlingham v. New Bern*, 213 Fed. 1014, 1019, 1020.

If the validity of the bonds can be inquired into at all in a suit brought by citizens and taxpayers against the city authorities to enjoin the sale and disposition of bonds where the bonds have been sold and the purchaser thereof is not a party to the suit, and where the bonds had been duly approved and certified and registered in accordance with the law, the only

ground upon which their validity can be attacked is forgery or fraud or that their issuance was contrary to the constitution of the state. The Texas statute provided that such bonds after receiving the certificate of the attorney general and having been registered in the comptroller's office as provided in the law, shall thereafter be held in every action, suit or proceedings in which their validity is or may be brought into question, prima facie valid and binding obligations. And in every action brought to enforce collection of such bonds the certificate of the attorney general, or a certified copy thereof, shall be admitted and received in evidence of the validity of such bonds, together with the coupons thereto attached. But it is provided that the only defenses which can be offered against the validity of the bonds shall be forgery or fraud. The law expressly provides that it is not intended to give validity to any bonds that may be issued in excess of the limit fixed by the constitution or contrary to its pro-

visions, but that all such bonds shall, to the extent of such excess, be held void. The court expressed the opinion that the purpose and intent of the statute is to make valid, in the hands of a purchaser all municipal bonds that have been approved, certified and registered in accordance with the provisions of the statute, unless such bonds are forgeries or were fraudulently issued, or issued contrary to the constitution. The court expressed further the opinion that if no defense other than forgery or constitutionality can be

urged against a suit brought to enforce a collection of such bonds by the purchaser, a suit brought by the taxpayers to have such bonds declared invalid can only be maintained upon one of the grounds above mentioned. *Simpson v. Nacogdoches* (Tex. Civ. App.), 152 S. W. 858.

Where bonds were issued under an unconstitutional act, and therefore, void, the purchaser of the bonds may recover of the municipality the amount paid therefor. *Henderson v. Winstead* (Ky. 1919), 215 S. W. 527.

CHAPTER 44.

TAXATION BY MUNICIPALITIES.

- I. GENERAL CONSIDERATION.
- II. POWER TO TAX.
- III. DUTY TO LEVY TAXES.
- IV. CONSTITUTIONAL RESTRICTIONS.
- V. LIMITATIONS ON RATE OR AMOUNT OF TAXES.
- VI. PROPERTY TAXABLE.
- VII. EXEMPTIONS FROM TAXATION.
- VIII. LIEN, LEVY, COLLECTION AND DISTRIBUTION.

I. GENERAL CONSIDERATION.

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| § 2359. Definition, history and nature. | § 2361. Conditions precedent to levy. |
| § 2360. Power of legislature to delegate authority to tax. | § 2362. Same—election. |

II. POWER TO TAX.

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| § 2363. Power as inherent. | § 2371. Same—construction of statute granting power. |
| § 2364. Poll taxes. | |
| § 2367. Power as conferred by constitution. | § 2372. Taxes must be for a public purpose. |
| § 2368. Municipal charters as conferring power. | § 2373. Revoking or limiting power of taxation. |
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III. DUTY TO LEVY TAXES.

- § 2376. Duty to levy and enforcement thereof.

IV. CONSTITUTIONAL RESTRICTIONS.

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V. LIMITATIONS ON RATE OR AMOUNT OF TAXES.

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VI. PROPERTY TAXABLE.

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VIII. LIEN, LEVY, COLLECTION AND DISTRIBUTION.

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| § 2403. Lien of taxes. | § 2409. Forfeiture and penalties for nonpayment. |
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| § 2406. Payment and collection. | § 2412. Disposition of taxes after collection. |
| § 2407. Same—remedies for collection. | |
| § 2408. Same—sale for unpaid taxes. | |

I. GENERAL CONSIDERATION.

§ 2359. Definition, history and nature.

The power of taxation is a governmental power, and is not dependent on contract.¹

§ 2360. Power of legislature to delegate authority to tax.²

¹ *Lynchburg v. Lynchburg Traction & Light Co.* (Va. 1919), 97 S. E. 780.

² "From the earliest date the local authorities in the counties and cities of the commonwealth have by the General Assembly been authorized to impose local taxes and fix the rate thereof." *Powers v. Richmond*, 122 Va. 328, 94 S. E. 803.

Law construed to authorize the legislature to create municipal corporations and give them the power to raise by taxation the expense of doing whatsoever the corporation is authorized to do. *Hutchins v. Hanna*, 179 Ia. 912, 162 N. W. 225, 159 N. W. 199.

Power conferred to levy tax to support juvenile court, held unconstitutional in particular in

§ 2361. Conditions precedent to levy.³

§ 2362. Same—election.

Taxation for specified purposes by the municipality is often required to be authorized by a majority or a named percentage of the local electors.⁴

For example, for the construction of sewage disposal works, by some laws, an additional tax in excess of the levies by general law may be sanctioned by a favorable vote of the electors.⁵

II. POWER TO TAX.

§ 2363. Power as inherent.

One of the most essential powers of government is the right to raise revenue; no government could maintain itself without such power. The taxing power belongs alone to sovereignty. No such power inheres in municipal corporations. This principle is universally recognized.⁶

Therefore as municipal corporations have no inherent

stance. *Campbell County v. Newport*, 174 Ky. 712, 193 S. W. 1, L. R. A. 1917D, 791.

“The power to tax inheres in the state as an attribute of its sovereignty, and is not dependent upon a grant of power in the constitution. Constitutional provisions relating to taxation are not grants of power, but limitations upon the exercise of a power necessarily possessed by every sovereign state. Except as restricted by such provisions, the power of the state to tax is unlimited.” *State ex rel. v. Ely*, 129 Minn. 40, 151 N. W. 545.

³ Must be observed. *People ex rel. v. Wabash R. Co.*, 282 Ill. 218, 118 N. E. 402, 404.

⁴ *Ward v. McDonald (Ala.)*, 77 So. 827; *People ex rel. v. Wabash*

R. Co., 282 Ill. 218, 118 N. E. 402, 404; *People ex rel. v. Chicago B. & Q. R. Co.*, 282 Ill. 206, 118 N. E. 439, 443; *People ex rel. v. Wabash R. Co.*, 276 Ill. 92, 114 N. E. 552; *People ex rel. v. Illinois Central R. Co.*, 266 Ill. 240, 107 N. E. 253.

⁵ *State ex rel. v. Zangerle*, 95 Ohio 58, 115 N. E. 511.

⁶ *Booten v. Pinson*, 77 W. Va. 412, 89 N. E. 985, 989, L. R. A. 1917A, 1244, citing § 2363, vol. 5, ante.

“Taxation by a municipality can in no event be made to depend upon contract, but must rest upon authority granted to the city by the legislature.” *Lynchburg v. Lynchburg Traction & Light Co.* (Va. 1919), 97 S. E. 780.

power of taxation,⁷ consequently they possess only such power in respect thereto which has been granted to them by the constitution or the statutes.⁸

The grant relied upon must be evident and unmistakable, and all doubts will be resolved against its exercise, and in favor of the taxpayer.⁹

But while it is undoubtedly true, as a general proposition, that taxes must be plainly authorized before they can be levied and collected, "this rule does not go to the extent of cutting off and shutting out all the light that

⁷ *State v. Houston & T. C. Ry. Co.* (Tex. Civ. App. 1919), 209 S. W. 820.

"Municipal corporations have no inherent taxing power." All the power they may exercise in this respect "is that which the state has expressly delegated to them." *Best v. Birmingham* (Ala.), 79 So. 113, 116.

⁸ *State ex rel. v. Ely*, 129 Minn. 40, 151 N. W. 545.

Express power. *Roney v. Lane County*, 81 Or. 372, 159 Pac. 73.

Power to tax must exist, otherwise it cannot be exercised. *Fairbanks v. Independent Meat Market*, 4 Alaska 147.

"Taxes cannot be assessed except by authority of the legislature." *Boston & M. R. R. v. Concord*, 78 N. H. 192, 98 Atl. 66.

It is well settled that a tax must be plainly authorized before the citizen can be charged therewith. *Richmond v. Drewry-Hughes Co.* (Va.), 90 S. E. 635.

"Municipalities have no powers of taxation other than specifically given by the statutes." *Chamberlain v. Bridgeport*, 88 Conn. 480, 91 Atl. 380, 383.

"The power of taxation is vested primarily in the state and may be lawfully exercised by the subordinate political bodies of the state only in so far as and in the manner in which the said power is delegated to them by the legislature." The legislature may provide that municipalities may exercise the taxing power in any way that is deemed expedient, provided no provision of the constitution is violated. *Re Opinion of Judges*, 39 R. I. 1, 97 Atl. 21.

Levy of tax by port must be authorized. *State ex rel. v. Johnson*, 80 Or. 107, 156 Pac. 579.

Quasi municipal corporation, e. g., a fire district, given power to raise money by taxation. *President, etc., of Williams College v. Williamstown*, 219 Mass. 46, 106 N. E. 687.

Towns in Alaska are given power by act of Congress to levy taxes. *Valdez v. Fish*, 4 Alaska 427.

Park tax. *People ex rel. v. Wabash R. Co.*, 276 Ill. 92, 114 N. E. 552.

⁹ *Portland v. Portland Ry. L. & P. Co.*, 80 Or. 271, 156 Pac. 1058, 1067.

may be reasonably brought to bear in determining the intention of the lawmaking power.”¹⁰

Thus power to levy a tax may be implied from express power given, as for example, power to incur an obligation where the legislature must have intended a tax to furnish means of payment and there is nothing to rebut the presumption.¹¹

A grant of power of taxation to municipalities is not without limitation or restriction. Grants are usually so construed.¹²

§ 2364. Poll taxes.¹³

As a city or town possesses no inherent power to im-

¹⁰ *Richmond v. Drewry-Hughes Co.*, 122 Va. 178, 94 S. E. 989, 993.

¹¹ *Union Pac. R. Co. v. Heuer*, 97 Neb. 436, 150 N. W. 259.

“Municipalities have no right to levy taxes unless the authority to do so is expressly conferred by the legislature, or is necessarily implied from some other power expressly given, which cannot be exercised without the right to levy a tax, as, for instance the power to issue bonds, with no express provision as to how they shall be paid.” *Booten v. Pinson*, 77 W. Va. 412, 89 N. E. 985, 989, L. R. A. 1917A, 1244, citing § 2363, vol. 5, ante.

Where authority is granted to a municipality or other subdivision of the state to contract an extraordinary debt by the issuance of negotiable securities it has the power to levy taxes sufficient to meet such debt at maturity unless the law which confers the authority or some general law in force at the time, clearly manifests a contrary legislative intention. *Minden-Edison Light & Power Co. v. Minden*, 94 Neb. 161, 142 N. W.

673, following *Ralls County Court v. United States*, 105 U. S. 733, 26 L. ed. 1220, and other United States Supreme Court decisions.

“Where a municipal corporation is granted the power to create a municipal debt, and no other provision is made for its payment, it has the right to levy the necessary taxes to pay it, and the power attaches by necessary implication. The one is the complement of the other. The right to borrow carries with it the obligation to pay, and as a municipality has no means of paying its indebtedness, except by taxation, it necessarily has this power.” *Paul v. Huse*, 113 Me. 449, 92 A1. 520.

¹² *Portland v. Portland Gas & Coke Co.*, 80 Or. 194, 156 Pac. 1070.

“The city must look to its charter for its power to levy its tax, and must abide by the limitations upon those powers which are therein expressed.” *Albers v. St. Louis*, 268 Mo. 349, 188 S. W. 83, 85.

¹³ *Nixa v. Wilson*, 199 Mo. App.

pose a poll tax,¹⁴ the power to do so must be granted in plain terms.¹⁵ The right to levy being derived from the state, the power may be extended or limited within the discretion of the legislature.¹⁶ Authority to require the payment of a street tax or perform labor on the street in lien thereof, is authority to impose a fine in event of refusal.¹⁷

§ 2367. Power as conferred by constitution.

Constitutional authority to levy a tax cannot be restricted by legislative enactment, as for example, conditioning its exercise by a vote of the electorate.¹⁸

Although under the home rule provisions of the Ohio Constitution, municipalities of that state may "exercise

33, 200 S. W. 703; *Page v. Farmery*, 29 N. D. 209, 150 N. W. 471.

¹⁴ *Ex parte Birmingham* (Ala.), 79 So. 113.

¹⁵ Law requiring a street tax of a specified sum per year, held a tax and not the exaction of a public duty as a requisition of labor for working the public highway. *Best v. Birmingham* (Ala. App.), 78 So. 100.

Poll tax may be imposed by ordinance, pursuant to statute authorizing cities to require male residents to work on streets, or pay named sum. *Ottumwa v. Scott*, 158 Ia. 385, 139 N. W. 901.

Poll tax payable in cash or in work on streets, held valid under law providing such tax may be required not exceeding an amount named. *Ex parte Birmingham* (Ala.), 79 So. 113.

In default, imposition of fine, held constitutional, is not imprisonment for debt. *Ib.*

Acceptance of labor in lieu of the payment of money. *Best v. Birmingham* (Ala.), 79 So. 113.

"The general power to control streets and highways does not include the power to compel citizens to work thereon." *Re Lankford* (Okl. 1919), 178 Pac. 673.

¹⁶ Restricting the power given by legislative act may invalidate ordinance or parts thereof on the subject. *State ex rel. v. Superior Court*, 92 Wash. 360, 159 Pac. 383.

Exemption from working on the public roads, held not to exempt citizens of a municipality from the payment of a street tax, since the terms "road duty" and "street duty" have separate and distinct fields of operation, the one referring to roads outside of the city, the other to streets inside the city. *Best v. Birmingham* (Ala. App. 1918), 80 So. 695.

¹⁷ *Best v. Birmingham* (Ala.), 79 So. 113, reversing (Ala. App.), 78 So. 100, 104.

¹⁸ *Calland v. Springfield*, 264 Mo. 296, 174 S. W. 396.

all the powers of local self-government," they do not possess unrestricted power as to taxation for local or municipal purposes, since taxation has always been recognized as a power of sovereignty, inherent in the state.¹⁹

§ 2368. Municipal charters as conferring power.²⁰

If the state laws make provision for a uniform and equal rate of taxation in accordance with the constitution, the municipal charter need not necessarily contain the statutory provisions where the general statutes are applicable to the municipality, and under such power a municipality may make proper regulations for taxation

¹⁹ "The sovereign people of the state may yield a part of its sovereignty by a constitutional provision; but whatever rule of construction may otherwise apply, wherever the contention is made that the state has yielded to a community a part of the sovereign power, the rule of liberal construction does not apply, but it must clearly and unambiguously appear that the state has done so by apt words contained in the constitution." *State ex rel. v. Cooper*, 97 Ohio 86, 119 N. E. 253, holding that the home rule provisions of the constitution authorizing chartered municipalities "to exercise all powers of local self-government," did not prevent the legislature from limiting the taxing powers of municipalities, and constituting administrative agencies to supervise, adjust and levy taxes.

²⁰ *Georgia. Canuet v. Guyton*, 147 Ga. 677, 95 S. E. 227.

Louisiana. Paepcke Leicht Lumbar Co. v. Van Trompt, 137 La. 743, 69 So. 159.

Missouri. State ex rel. v.

Young, 259 Mo. 52, 167 S. W. 995.
New York. Rudolph Wallach Co. v. Rooney, 164 N. Y. S. 616, 177 App. Div. 640.

Ohio. State ex rel. v. Lynch, 88 Ohio 71, 102 N. E. 670.

Oklahoma. Collinsville v. Ward (Okl.), 165 Pac. 1145.

Oregon. Portland v. Portland Gas & Coke Co., 80 Or. 194, 156 Pac. 1070.

Texas. San Antonio v. Johnson (Tex. Civ. App.), 186 S. W. 866; *Austin v. Great Southern Life Ins. Co. (Tex. Civ. App. 1919)*, 211 S. W. 482.

Virginia. Richmond v. Drewry-Hughes Co., 122 Va. 178, 94 S. E. 989; *Powers v. Richmond*, 122 Va. 328, 94 S. E. 803.

Washington. New Seattle Chamber of Commerce v. Seattle, 88 Wash. 620, 153 Pac. 351.

Levy of tax by municipality before the approval of the act creating its charter is unauthorized and may be enjoined. *Colquitt Live Stock & Supply Co. v. Colquitt*, 146 Ga. 579, 91 S. E. 555.

agreeably to the constitution. Thus an ordinance which prescribes regulations in substantial accord with the statutory regulations for obtaining just valuations and uniform and equal taxation is sufficient on the subject.²¹ Whether the provisions of a municipal charter as to the method of levying and collecting taxes will prevail over the provisions of statutes on the subject will depend upon a proper construction of the applicable laws, and the policy of the given state relating to the matter.²²

§ 2370. Statutory authority.²³

§ 2371. Same—construction of statute granting power.²⁴

A citizen cannot be subjected to the burden of taxation without clear warrant of law. Therefore, "statutes authorizing the levy of taxes are to be strictly construed; they are not to be extended by implication, nor is their operation to be enlarged so as to embrace matters not

²¹ *Graham v. West Tampa*, 71 Fla. 605, 71 So. 926.

²² Provisions of general statute as to taxation, held not controlling as the charter was regarded as the measure of municipal power. *Merrell v. St. Petersburg*, 64 Fla. 367, 60 So. 349.

Provisions of a city charter in so far as they regulated the method of levying and collecting taxes for purely municipal purposes were held to prevail over the general laws of the state in reference thereto in so far as such general laws are in conflict therewith. *Rogers v. Bass & Harbour Co. (Okl.)*, 168 Pac. 212; *Collinsville v. Ward (Okl.)*, 165 Pac. 1145.

²³ *Kentucky Heating Co. v. Louisville*, 174 Ky. 142, 192 S. W. 4; *Norris v. Montezuma Valley Irr. Dist.*, 248 Fed. (C. C. A.) 369;

Paul v. Huse, 113 Me. 449, 92 Atl. 520; *People ex rel. v. Klee*, 282 Ill. 440, 118 N. E. 754; *State ex rel. v. Cooper*, 97 Ohio 86, 119 N. E. 253.

Hard road tax, to be sanctioned by vote of the electors. *People ex rel. v. Illinois Central R. Co.*, 266 Ill. 240, 107 N. E. 253.

To pay bonded indebtedness and interest on the same, and judgments against city. *Atchison, T. & S. F. Ry. Co. v. Kansas City*, 92 Kan. 300, 140 Pac. 1040.

General improvement fund, water fund, judgment fund, library fund, lighting fund, general revenue fund, and current expenses, as the usual ordinary running and incidental expenses of the municipality. *Atchison, T. & S. F. Ry. Co. v. Topeka*, 95 Kan. 747, 149 Pac. 697.

²⁴ Section 2363, ante.

specifically pointed out, though standing upon a close analogy.”²⁵

The judicial construction should be in keeping with the natural and probable legislative purpose, and avoid conflict, and harmonize all the applicable provisions of the law on the subject, if possible.²⁶

In case of doubt, courts sometimes give weight to the interpretation adopted by the executive department of the state which is specially charged with the duty of construing and effectuating the several provisions of the law bearing on the subject.²⁷

In construing repeals of and changes in tax laws it should be borne in mind that the question is not always one of original grant of power to tax, requiring the application of the rule of *strictissimi juris*. In construing tax statute it may be that the power to levy and collect the tax involved has been unquestioned and exercised for many years. Moreover, if the question is solely one of repeal by implication, the general rule that such repeals are not favored may come into play.²⁸

§ 2372. Taxes must be for a public purpose.

Taxation to raise money to compromise a claim authorized by statute though not legally binding but equitably payable is a public purpose.²⁹

So is taxation to construct and maintain a filtration plant required by statute,³⁰ to establish and maintain free

²⁵ *Best v. Birmingham* (Ala. App.), 78 So. 100, 102.

Such claim as a judgment against the municipality is not included within the ordinary expenses for which the maximum tax levy is established by law. *Arthur v. Horwege*, 28 Cal. App. 738, 153 Pac. 980.

²⁶ “Plainly it is our duty, under settled and familiar rules of construction, to harmonize these several cognate acts of the legisla-

ture (relating to taxation), if this can be done without violence to their several express terms.” *Richmond v. Drewry-Hughes Co.*, 122 Va. 178, 94 S. E. 989, 991, 992.

²⁷ *Richmond v. Drewry-Hughes Co.* 122 Va. 178, 94 S. E. 989, 992.

²⁸ *Richmond v. Drewry-Hughes Co.*, 122 Va. 178, 94 S. E. 989, 993.

²⁹ *Re Christey*, 155 N. Y. S. 39, 92 Misc. Rep. 1.

³⁰ *State ex rel. v. Dean*, 95 Ohio 108, 116 N. E. 37.

public libraries and reading rooms,³¹ to purchase, hold and improve grounds for parks, and university campus extension,³² and to raise money to maintain coal and fuel yards, and to sell coal and fuel to the inhabitants of the municipality.³³

But taxation to enable the municipality to make and sell ice was denied.³⁴

A memorial to the soldiers and sailors of the recent world war was held a public purpose.³⁵

§ 2373. Revoking or limiting power of taxation.³⁶

III. DUTY TO LEVY TAXES.

§ 2376. Duty to levy and enforcement thereof.³⁷

³¹ *People ex rel. v. Turnbull*, 184 Ill. App. 151.

Under a constitution giving power to the legislature to authorize the several incorporated cities and towns in the state to assess and impose taxes "for municipal purposes, and for no other purposes," a library may be declared by legislative act a municipal purpose. *Tampa v. Prince*, 63 Fla. 387, 58 So. 542.

A statute was held constitutional which authorized a tax for free public libraries which in effect are as though owned and managed by the city or town, notwithstanding the library involved was controlled by a corporation whose officers were not selected or under the control of the municipality. The test to be applied is not whether the agency is public, but whether the purpose is public within the legitimate functions of our constitutional government. *State ex rel. v. Bentley*, 163 Wis. 632, 158 N. W. 306.

³² The tax was authorized to se-

cure the location of the state university, etc. *Sinclair v. Lincoln*, 101 Neb. 163, 162 N. W. 488.

³³ *Jones v. Portland*, 245 U. S. 217, 38 Sup. Ct. 504, 62 L. ed. 252, affirming 113 Me. 123, 93 Atl. 41.

³⁴ *State ex rel. v. Orear*, 277 Mo. 303, 316-329, 210 S. W. 392, 396-400.

³⁵ *Hill v. Roberts* (Tenn. 1920), 217 S. W. 826.

³⁶ *State ex rel. v. Orear*, 277 Mo. 303, 210 S. W. 392, citing § 2373, vol. 5, ante.

³⁷ Duty to levy exists and may be required by mandamus. *Perkins v. People*, 59 Colo. 107, 147 Pac. 356.

Mandamus to compel certification of amount required for particular purpose. *State ex rel. v. Zangerle*, 94 Ohio St. 447, 115 N. E. 1013.

Mandamus to compel levy, to pay judgment. *State ex rel. v. Willow Springs* (Mo.), 183 S. W. 589; *Menar v. Sanders*, 169 Ky. 285, 183 S. W. 949.

IV. CONSTITUTIONAL RESTRICTIONS.

§ 2378. In general.³⁸

A constitutional restriction that the legislature shall have no power to release or extinguish debts or liabilities of municipal corporations does not forbid a charter provision that taxes delinquent for ten years prior to the institution of suit therefor shall be barred.³⁹

Under a constitutional provision requiring that the valuation put upon property for the purposes of state taxation shall be taken as the proper valuation for the purpose of local taxation in every subdivision of the state, a legislative act authorizing local authorities in a municipality to increase or diminish the valuation of property as assessed for taxation was held unconstitutional.⁴⁰

§ 2380. Uniformity.⁴¹

V. LIMITATIONS ON RATE OR AMOUNT OF TAXES.

§ 2384. Tax limits in general.⁴²

The limit of the rate of taxation prescribed, of course,

³⁸ Constitutional provisions as to qualification of voters and statutory provisions on the same subject, in matters relating to taxation. Re Opinion of Judges, 39 R. I. 1, 97 Atl. 21.

³⁹ San Antonio v. Johnson (Tex. Civ. App.), 186 S. W. 866.

⁴⁰ McCune v. White, 137 La. 310, 68 So. 621.

⁴¹ Graham v. West Tampa, 71 Fla. 605, 71 So. 926; Merrell v. St. Petersburg, 64 Fla. 367, 60 So. 349; Norris v. Montezuma Valley Irr. Dist., 248 Fed. (C. C. A.) 369.

Uniformity, and double taxation. Campbell County v. Newport, 174 Ky. 712, 193 S. W. 1, L. R. A. 1917D, 791.

Duplicate taxation. State ex rel.

v. Young, 259 Mo. 52, 167 S. W. 995.

Exempting manufacturing establishments from municipal taxation as authorized by the constitution. Elam v. Salisbury, 180 Ky. 142, 202 S. W. 56; § 2399, et seq., post.

“There can be no question about the power to tax different classes of intangible property at different rates. A contrary holding would strike a fatal blow at the entire plan of taxation as established by the General Assembly in 1915; and would, furthermore, be contrary to the settled law on the subject.” Richmond v. Drewry-Hughes Co., 122 Va. 178, 94 S. E. 989, 993.

⁴² Idaho. Standrod v. Case, 24 Idaho 365, 133 Pac. 651.

is to be observed, at least in all substantial respects.⁴³

The maximum tax rate cannot be exceeded, except for

Illinois. *People ex rel. v. Illinois Central R. Co.*, 266 Ill. 240, 107 N. E. 253.

Kansas. *Atchison, Topeka & Santa Fe v. Hutchinson*, 96 Kan. 202, 150 Pac. 534.

Kentucky. *London v. Brown* (Ky. 1919), 208 S. W. 317.

Pennsylvania. *Commonwealth ex rel. v. Repp*, 242 Pa. 240, 88 Atl. 1007.

Texas. *Williamson v. Cayo* (Tex. Civ. App.), 198 S. W. 643.

Virginia. *Lynchburg v. Lynchburg Traction & Light Co.* (Va. 1919), 97 S. E. 780.

Washington. *Owings v. Olympia*, 88 Wash. 289, 152 Pac. 1019.

Local authorities may fix the rates of taxes. *Powers v. Richmond*, 122 Va. 328, 94 S. E. 803.

Assessments for city purposes to be the same as the state purposes. *Powers v. Richmond*, 122 Va. 328, 94 S. E. 803.

Statutory limit, held not applicable to levy to pay principal and interest on bonds issued under particular legislative act. *Bain v. Goldboro*, 164 N. C. 102, 80 S. E. 256.

Constitutional limitation as to rate, held to have no application to special levy to pay a judgment based on tort. *State ex rel. v. Willow Springs* (Mo.), 183 S. W. 589, 593, 594, relying on *Connor v. Nevada*, 188 Mo. 148, 153, 86 S. W. 256, 107 Am. St. Rep. 314, which was followed in *Menar v. Sanders*, 169 Ky. 285, 183 S. W. 949.

Curative statute validating taxes

levied in excess of the limit. *Owings v. Olympia*, 88 Wash. 289, 152 Pac. 1019.

Where charter amendment provisions as to limitation of rate is so vague, indefinite and doubtful, a tax levy should not be undertaken under it, but the limitation should not be beyond that prescribed in the original charter. *Stevens v. Taylor*, 79 Or. 424, 154 Pac. 895.

⁴³ *People ex rel. v. Cleveland, C. & St. L. Ry. Co.*, 267 Ill. 160, 107 N. E. 801.

Levy in excess of constitutional limit is void. *Laredo v. Frismuth* (Tex. Civ. App.), 196 S. W. 190.

Under a constitution that valuation of property for municipal taxation should not exceed valuation for state and county purposes a valuation in excess under a statute, is void. *State ex rel. v. Center Creek Mining Co.*, 262 Mo. 490, 171 S. W. 356.

Cannot exceed limit fixed by municipal charter. *Canuet v. Guyton*, 147 Ga. 667, 95 S. E. 227.

If a municipality incurs expense that actually results in raising the tax rate contrary to the prohibition of the law the remedy would seem to be by way of an attack on the tax rate and not on a particular item on which it is based. Where it is claimed that the limit of taxation will be exceeded in the issue of bonds for a lighting system, but where this does not appear, "for, assuming that the present rate is of its limit, and that the interest on the bonds and

the purposes particularly specified in the law. Evasions of such limitation will not be tolerated, as for example, allowing debts to assume the form of judgments.⁴⁴

Limitations of rate of taxation frequently do not apply to raising money to acquire public utilities, as a water supply. These are frequently exempt from the limitation.⁴⁵

Law sometimes permit an increase of the usual rate in event of great emergency or necessity.⁴⁶

Whether there is a necessity for the suspension of the limit is one of fact and the determination of the corporate authorities of the existence of such necessity is not final. A mere declaration in an ordinance to that effect is not conclusive.⁴⁷

§ 2387. Effect of levy above tax limit.⁴⁸

costs of maintenance would go to swell the rate, nonconstat that a sufficient saving will not be effected by the discontinuance of the old system or in other ways to offset this increase. In any event, it is difficult to see how an anticipated increase in the tax rate can be made a legal objection to a particular ordinance calling for the expenditure of money." *Livermore v. Millville*, 82 N. J. Eq. 648, 90 Atl. 380.

⁴⁴ *People ex rel. v. Chicago L. S. & E. Ry. Co.*, 270 Ill. 477, 110 N. E. 720.

When municipalities may levy a special tax in excess of the annual rate for municipal purposes to pay valid debts already contracted where its current funds for the year have been expended for other purposes. *State ex rel. v. Continental Zinc Co.*, 272 Mo. 43, 197 S. W. 112.

⁴⁵ *Lanigan v. Gallup*, 17 N. M. 627, 131 Pac. 997.

⁴⁶ The law plainly means a necessity or emergency of grave character and serious moment; an unseen occurrence or combination of circumstances which calls for an immediate action or remedy; pressing necessity; exigency. *San Christina Inv. Co. v. San Francisco*, 167 Cal. 762, 141 Pac. 384, 52 L. R. A. (N. S.) 676.

Provision that taxes should not exceed a named rate except in event of great emergency or necessity, justifying a suspension of the limitation, but provided that it should be by unanimous vote of the legislative body. *San Christina Inv. Co. v. San Francisco*, 167 Cal. 762, 141 Pac. 384, 52 L. R. A. (N. S.) 676.

⁴⁷ *Josselyn v. San Francisco*, 168 Cal. 436, 143 Pac. 705; *San Christina Inv. Co. v. San Francisco*, 167 Cal. 762, 141 Pac. 384.

⁴⁸ *Illegal. Bush v. Beloit* (Kan. 1919), 181 Pac. 615.

VI. PROPERTY TAXABLE.

§ 2388. In general.⁴⁹

§ 2389. Property not receiving benefits.

"The principle that protection and taxation go together, while it underlies in a general way, the theory of our system of taxation does not stand as an obstacle to the legislature levying such taxes and at such times as the public exigency may require. That property which has not received the slightest protection is made to pay taxes is a matter of everyday experience."⁵⁰

§ 2390. Property taxable as dependent on place where located.

True property within the city can be taxed for city

⁴⁹ *Bush v. Beloit* (Kan. 1919), 181 Pac. 615.

Property taxed, of course, should be in the municipality. *Leary v. Jersey City*, 126 C. C. A. 12, 208 Fed. 584, affirming 189 Fed. 419.

Usually power is given to tax property within the corporate limits. *Richmond v. Drewry-Hughes Co.*, 122 Va. 178, 94 S. E. 989.

Real estate in city. *Temescal Water Co. v. Niemann*, 22 Cal. App. 174, 133 Pac. 992.

Personal property of nonresident not taxable. *Lancaster v. Pope*, 156 Ky. 1, 160 S. W. 509.

Distilled spirits and whiskey in bonded warehouse cannot be assessed by city assessor, but when withdrawn from the warehouse they may be, etc. *Jetts Bros. Distilling Co. v. Carrollton*, 178 Ky. 561, 199 S. W. 37; *Kraver v. Henderson*, 155 Ky. 633, 160 S. W. 257.

"Intangible personal property;" capital of merchants as a separate class. *Richmond v. Drewry-Hughes Co.*, 122 Va. 178, 94 S. E. 989, 992.

Levy of taxes on machinery of

tenant as property of owner, is void. *People ex rel. v. Prendergast*, 168 N. Y. S. 907.

Municipalities prohibited from taxing railways or railway property. *Alaska Northern Ry. Co. v. Seward*, 229 Fed. 667, 144 C. C. A. 77.

Right to assess personal property of railroads denied under particular statute. *Boston & M. R. R. v. Concord*, 78 N. H. 192, 98 Atl. 66.

Personal property of a telephone company cannot be assessed without express grant of power. *Hayattsville v. Chesapeake & Potomac Tel. Co.*, 131 Md. 589, 103 Atl. 133.

Decedents estates. *Bamberger v. Baltimore*, 125 Md. 431, 94 Atl. 8.

Annexed property. *Hutchinson v. Stewart* (Kan. 1919), 185 Pac. 740.

⁵⁰ *Morgan's Louisiana & T. R. R. & S. S. Co. v. White*, 136 La. 1074, 68 So. 130.

purposes, under ample power,⁵¹ but no power exists to levy tax on property beyond the corporate limits, as cattle or other stock, although the meat thereof is sold within the town.⁵²

A municipality may not levy a direct tax upon subjects of taxation outside the state from which it holds its powers. These subjects are persons, property and business, and each must be situated within the jurisdiction of the taxing power to authorize its exercise. But a municipality having power to license and tax manufacturers within its limits according to the amount of sales may levy a tax on goods made in the city, whether stored in the state or elsewhere prior to sale, and whether sold from the manufacturer's office in the state or from its chief office in another state. Such tax is a tax upon property as distinguished from a tax upon business.⁵³

Concerning the right of a municipality to levy taxes on a lease owned by a corporation with its principal place of business in the city, as money invested in the enterprise, it was held that the lease represented capital invested in the business although the property leased was beyond the municipal area.⁵⁴

⁵¹ *State ex. rel. v. Nickerson*, 99 Neb. 517, 156 N. W. 1039.

Lands taken for storage, reservoirs, etc., for water supply to the city, to be assessed and taxed in the counties in which located. *People ex rel. v. Neville*, 170 N. Y. S. 583.

Right to tax canals, pipe lines, ditches and conduits for the conveyance and distribution of water, etc. *Temescal Water Co. v. Niemann*, 22 Cal. App. 174, 133 Pac. 992.

"Intangible personal property," includes capital of merchants. *Richmond v. Drewry-Hughes Co.*, 122 Va. 178, 94 S. E. 989, reversing 90 S. E. 635; *American Tobacco Co. v. Richmond* (Va. 1919), 99 S. E. 777.

Tax of trust fund where trustees resided in various municipalities under will of decedent who prior to his death resided in the municipality levying the taxes and the trust fund was created to repair certain church buildings in another municipality. *McLelland v. Concord*, 78 N. H. 89, 97 Atl. 552.

Personal property within municipal area. *Austin v. Great Southern Life Ins. Co.* (Tex. Civ. App. 1919), 211 S. W. 482.

⁵² *Fairbanks v. Independent Meat Market*, 4 Alaska 147.

⁵³ *American Mfg. Co. v. St. Louis*, 270 Mo. 40, 192 S. W. 402.

⁵⁴ *Johnston v. Harrison Naval Stores Co.*, 108 Miss. 627, 67 So. 147.

Under a law authorizing a municipality to tax property within its limits, taxes may be collected on property in the town when the liability for taxes is fixed by the law, although before the assessment and levy the property was removed from the municipal area due to a change of its limits.⁵⁵

§ 2391. Same—vessels.⁵⁶

§ 2393. Property of grantee of franchise.⁵⁷

§ 2397. Municipal property.⁵⁸

§ 2398. Rural property.⁵⁹

VII. EXEMPTION FROM TAXATION.

§ 2399. In general.

The most recent decisions adhere to the familiar rule that a municipality has no inherent power to exempt from taxation property which it is authorized by statute or its charter to tax.⁶⁰

⁵⁵ *Adams v. Lambfish Lumber Co.*, 114 Miss. 534, 75 So. 378.

⁵⁶ *Wright v. Brunswick*, 140 Ga. 231, 78 S. E. 839; *Martin v. Burleigh County*, 38 N. D. 373, 165 N. W. 520.

Vessel taxable by city where located. If navigation corporation has principal office in city, vessels may be taxed there. *St. Simons Transfer Co. v. Brunswick*, 141 Ga. 477, 81 S. E. 199.

⁵⁷ *San Francisco v. Pacific Tel. & Tel. Co.*, 166 Cal. 244, 135 Pac. 971; *Louisville & N. R. Co. v. Henderson*, 154 Ky. 575, 157 S. W. 1105.

Franchises of corporation doing business in the municipality may be taxed for municipal purpose by legislative grant. *Kentucky Heat- ing Co. v. Louisville*, 174 Ky. 142,

192 S. W. 4. Method of determining value. *Ib.*

⁵⁸ Not taxable. *Oakland v. Albers Bros. Milling Co.* (Cal. App. 1919), 184 Pac. 868.

⁵⁹ *State ex rel v. Nickerson*, 99 Neb. 517, 156 N. W. 1039.

Classification of property for taxation as urban, suburban, and rural. *Smith v. Baltimore*, 120 Md. 143, 87 Atl. 824.

⁶⁰ *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122; *Portland v. Portland Ry. Light & Power Co.*, 80 Or. 271, 156 Pac. 1058, 1063, citing § 2399, vol. 5, ante.

Ordinance exempting property from taxation without authority is utterly void. *Adams v. Lambfish Lumber Co.*, 104 Miss. 48, 61 So. 6.

Without authority, an ordinance and contract exempting water com-

The latest cases also support the well settled rule that exemptions are not favored, and will not be allowed unless it is made clearly to appear that such was the statutory intent, and every reasonable doubt will be resolved in favor of the taxing power.⁶¹

Constitutions sometime exempt certain property from local taxation, as "operative property." In the case of express companies this has been held to include the franchise, cars, trucks, wagons, horses, harness and safes, and in the case of refrigerator car companies the definition is held to cover the franchises, cars and other rolling stock.⁶²

As an inducement to their location, constitutions sometime authorize the legislature to allow cities and towns to exempt new manufacturing establishments from municipal taxation for a stated period, e. g., five years.⁶³

pany from taxation will not be sustained. *Point Pleasant Water Works Co. v. Point Pleasant Beach Borough*, 87 N. J. L. 24, 93 Atl. 94.

Agreement between municipality and a railroad company to apply jointly to legislature to exempt the railroad property from taxation. *People ex rel. v. Mealy*, 152 N. Y. S. 435, 88 Misc. Rep. 649.

⁶¹ *Alaska Northern Ry. Co. v. Seward*, 229 Fed. 667, 144 C. C. A. 77.

⁶² *San Bernardino County v. State Board of Equalization*, 178 Cal. 76, 155 Pac. 458.

⁶³ *Elam v. Salisbury*, 180 Ky. 142, 202 S. W. 56; *B. F. McCormick Lumber Co. v. Winchester*, 155 Ky. 494, 159 S. W. 997; *Louisville v. Louisville Tin & Stove Co.*, 170 Ky. 557, 186 S. W. 124.

A statute pursuant to the constitution authorizing municipalities to exert such power, held not

applicable to exempt manufactories established in operation when the law was enacted. *Adams v. Lambfish Lumber Co.*, 103 Miss. 491, 60 So. 645.

Exempting new manufacturing establishments as an inducement to their location, it must appear that a new manufacturing enterprise was established in the city. "The mere expansion of an existing business, complied with a change of ownership, or the addition of new capital, or the erection of new buildings, or the adoption of new processes or improved facilities, or a change in the material of the manufactured product, or an increase in the number and variety of the articles manufactured, will not authorize the exemption." *Vogt Bros. M. Co. v. Sea*, 181 Ky. 327, 204 S. W. 76.

Under the Kentucky constitution power to exempt property from taxation cannot be conferred upon

Real property of scientific, literary, benevolent, charitable,⁶⁴ fraternal,⁶⁵ and religious institutions,⁶⁶ and buildings under construction⁶⁷ are, often exempt from taxation.⁶⁸

§ 2400. Construction of exemption provisions.⁶⁹

It is a cardinal rule that exempting statutes should receive a strict construction in the interest of the public.⁷⁰

municipalities. *Purcell v. Lexington* (Ky. 1919), 216 S. W. 599, 603.

"The legislature can, of course, confer upon cities and towns by general laws, the power to encourage the establishment of manufacturing within the corporate limits." Power to exempt from taxation for a named period is often restricted to those to be established. *Robertson v. Southern Paper Co.* (Miss. 1919), 80 So. 384.

Ordinance necessary to exempt machinery of laundry from taxation pursuant to statute. *Grand Family Laundry v. Baltimore* (Md. 1919), 106 Atl. 254.

⁶⁴ President, etc., of *Williams College v. Williamstown*, 219 Mass. 46, 106 N. E. 687.

⁶⁵ *Elks Theater Co. v. New Iberia* (La.), 78 So. 433.

⁶⁶ Exemption of parsonage owned by religious society. *St. Joseph's Church v. Detroit*, 189 Mich. 408, 155 N. W. 588.

⁶⁷ *People ex rel. v. Cantor*, 176 N. Y. S. 593; *People ex rel. v. Purdy*, 153 N. Y. S. 300.

⁶⁸ Agricultural lands exempt except for road purposes. *Huddleston v. Webster City* (Iowa 1919), 171 N. W. 1.

⁶⁹ Construction of constitutional provisions as to exemption. *San*

Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 135 Pac. 971.

As to the application of the rule ejusdem generis to provisions exempting property from local taxation. *San Bernardino County v. State Board of Equalization*, 178 Cal. 76, 155 Pac. 458.

"Manufacturing establishment," and "manufacture," as exempt from taxation. *American Tobacco Co. v. Bowling Green*, 181 Ky. 416, 205 S. W. 570; *Vogt Bros. Mfg. Co. v. Sea*, 181 Ky. 327, 204 S. W. 76.

As an inducement to manufacturing establishments to locate a constitutional provision authorized legislature to give towns, etc., power to exempt for five years, held applicable only to new establishments, not to those established which merely enlarge. *Louisville v. New York Baking Co.*, 151 Ky. 758, 152 S. W. 980.

Construction of statute of exemption from taxation of marsh and meadow lands protected from overflow by banks erected at the expense of property owners upon which land no structures exist, as applied to a manufacturing establishment on such lands. *Electric Hose & Rubber Co. v. Wilmington*, 5 Boyce (Del. Super.) 444, 94 Atl. 741.

⁷⁰ *Louisville v. New York Bak-*

Such statutes must be understood as exempting only as therein specified. A grant of exemption is never presumed; on the contrary in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption.⁷¹

Manufacturing establishments exempt from municipal taxation are not exempt from a school tax, since such tax is not municipal taxation, although levied by the municipality. It is a state tax. A school is a state institution. The municipality acts as an agent of the state in levying the tax.⁷²

Exemption to one "actually engaged" in manufacturing was held not applicable where the property was leased.⁷³

Where the constitution authorizes exemptions from taxation in favor of industries to be established only, an ordinance seeking to extend its limits to cover a plant already established and exempt it from taxation is without authority.⁷⁴

The doctrine of contemporaneous construction will not be invoked for the purpose of defeating the effect of plain and unambiguous constitutional and statutory provisions that impose taxes.⁷⁵

A provision of a contract between a water company

ing Co., 151 Ky. 758, 152 S. W. 980; Walker v. Richmond, 173 Ky. 26, 189 S. W. 1122.

"Exemption provisions must be strictly construed, and no one will be exempt from bearing his share of the public burdens unless the exemption be clearly given. American Tobacco Co. v. Bowling Green, 181 Ky. 416, 205 S. W. 570, 572.

Grant must be clear, otherwise no power to exempt exists. Richmond v. Virginia Ry. & Power Co. (Va. 1919), 98 S. E. 691.

⁷¹ St. Joseph's Church v. Detroit, 189 Mich. 408, 155 N. W. 588, 590.

⁷² Louisville v. Board of Education, 154 Ky. 316, 157 S. W. 379.

⁷³ Felipe A. Broadbent Mantel Co. v. Baltimore (Md. 1919), 106 Atl. 250.

⁷⁴ Robertson v. Southern Paper Co. (Miss. 1919), 80 So. 384.

⁷⁵ Louisville v. Board of Education, 154 Ky. 316, 157 S. W. 379.

and a municipality that if at any time any city tax, levy or assessment for any public purpose shall be imposed upon any of the property or works of the company, necessary for the supply of water, the rental agreed in such contract shall be increased to an amount equal to such city tax, assessment or levy, was held not to be an exemption of the property or works of the water company necessary for the supply of water from taxation.⁷⁶

VIII. LIEN, LEVY, COLLECTION AND DISTRIBUTION.

§ 2403. Lien of taxes.⁷⁷

As to tax bill liens the last one in point of time is the superior in point of claim for satisfaction.⁷⁸

A like rule applies between liens for general taxes due the city or state.⁷⁹

Liens for taxes to support the state or city are superior to tax bill liens for public improvements.

§ 2404. Procedure to levy taxes.⁸⁰

In levying the tax the method outlined in the law ap-

⁷⁶ Phillips v. Portsmouth, 115 Va. 180, 78 S. E. 651.

⁷⁷ Armstrong v. Mission Ind. School Dist. (Tex. Civ. App.), 195 S. W. 895; O'Connor v. Laredo (Tex. Civ. App.), 167 S. W. 1091; Davis's Ex'r v. Louisville, 171 Ky. 663, 188 S. W. 911.

Duration of lien. Hall v. Lockport, 153 N. Y. S. 298, 90 Misc. Rep. 429.

Discharge of lien after expiration of the time specified of its existence. Hall v. Lockport, 153 N. Y. S. 298, 90 Misc. Rep. 429.

Transfer of tax lien including both valid and invalid taxes, does not preclude the collection of valid tax liens. New York v. Appleby, 219 N. Y. 76, 113 N. E. 797, af-

firming 154 N. Y. S. 85, 168 App. Div. 503.

Description of property. *Ib.*

⁷⁸ Missouri Real Estate & Loan Co. v. Burri (Mo. App.), 216 S. W. 570.

⁷⁹ "The lien of each year's tax is paramount to all previous liens." Chadwick v. Cambridge, 230 Mass. 580, 119 N. E. 958.

⁸⁰ People ex rel. v. Wabash R. Co., 282 Ill. 218, 118 N. E. 402; People ex rel. v. Chicago B. & Q. R. Co., 282 Ill. 206, 118 N. E. 439; People ex rel. v. Sandberg Co., 282 Ill. 245, 118 N. E. 469; People ex rel. v. Chicago L. S. & E. Ry. Co., 270 Ill. 477, 110 N. E. 720; Sinclair v. Lincoln, 101 Neb. 163, 162 N. W. 488; St. Louis & San Fran-

plicable is required to be followed at least in substance as to all mandatory provisions.⁸¹

All laws on the subject should be construed together.⁸²

As declared in a Pennsylvania decision: "The fixing of a tax is one of the highest functions of municipal government." ⁸³

A tax levy "is the formal vote or action of the body authorized to make the levy. It has been defined as 'the formal and official action of a legislative body determining and declaring that a tax of a certain amount, or of a certain percentage on value, shall be imposed on persons and property subject thereto.' To levy a tax is to determine by vote the amount of taxes to be raised. The levying of taxes is not merely the ministerial action of ascertaining the rate percent." Finally, the levy of a tax is a legislative function, and the mere ministerial duty imposed upon specified officials of ascertaining the rate percent, as provided by law, is not the levy of a tax.⁸⁴

In brief, a determination of the tax rate is not a com-

cisco R. Co. v. Tate, 35 Okl. 563, 130 Pac. 941.

Levying a tax on real property for the removal of ashes by ordinance. People ex rel. v. Chicago, 200 Ill. App. 35.

Power to levy and collect a tax carries with it the implied power to employ the necessary procedure to execute the power and collect the revenue contemplated by the grant of power to make the levy. Standrod v. Case, 24 Idaho 365, 133 Pac. 651.

Must be at regular meeting of legislative body. Louisiana Western R. Co. v. Duson (La. 1919), 83 So. 455.

⁸¹ Adams v. Lambfish Lumber Co., 104 Miss. 48, 61 So. 6.

A tax may be levied only in the manner specified by law. It can-

not be levied, for example, by ordinance requiring the payment of a certain percentage of gross receipts, etc. Portland v. Portland Gas & Coke Co., 80 Or. 194, 156 Pac. 1070.

Provisions as to specifying in detail the purpose for which taxes are levied must be strictly followed. Ordinance failing to specify, is to the extent of such failure invalid. People ex rel. v. Vogt, 262 Ill. 170, 104 N. E. 226; People ex rel. v. Ross, 272 Ill. 63, 111 N. E. 548.

⁸² State ex rel. v. Bading, 156 Wis. 140, 145 N. W. 758.

⁸³ Commonwealth v. Repp, 242 Pa. 240, 88 Atl. 1007.

⁸⁴ Morrison v. Moir Hotel Co., 204 Ill. App. 433.

pliance with a requirement of the determination of the amount of the tax.⁸⁵

When the time for making the levy,⁸⁶ or the time when the amount of the tax is to be determined and certified, is definitely prescribed by the applicable law, such time can not be disregarded.⁸⁷

The officer designated to make the levy, and no others, should act.⁸⁸

Conditions precedent to the formal levy must not be omitted,⁸⁹ and as mentioned, all mandatory requirements in making the levy are to be observed with reasonable strictness.⁹⁰

Under some laws a tax levy must be initiated by ordinance, and not by resolution,⁹¹ but under others the action of the council in levying a tax may be in the form of a

⁸⁵ *People ex rel. v. Ross*, 272 Ill. 63, 111 N. E. 548.

⁸⁶ *Morgan's Louisiana & T. R. R. & S. S. Co. v. White*, 136 La. 1074, 68 So. 130.

Delay. *State ex rel. v. Johnson*, 80 Or. 107, 156 Pac. 579.

⁸⁷ *People ex rel. v. Ross*, 272 Ill. 63, 111 N. E. 548.

⁸⁸ *Rogers v. Bass & Harbour Co.* (Okl.), 168 Pac. 212.

⁸⁹ To levy tax to pay a judgment against the city requires a report thereof to be made prior to the levy to the appropriate municipal authorities. *Arthur v. Horwege*, 28 Cal. App. 738, 153 Pac. 980.

To levy additional tax for specified purpose, as to construct a sewage disposal plant, must be submitted to vote of electors. *State ex rel. v. Zangerle*, 95 Ohio 58, 115 N. E. 511.

⁹⁰ For special purposes as for a pension fund for fireman and policemen, to be levied as the general taxes of the municipality.

People ex rel. v. Daemicke, 278 Ill. 53, 115 N. E. 898.

Certification to legislative body of rate of tax required for named purposes, or various purposes, by designated officers, and when so certified, ordinance providing for taxation contains, etc. *State ex rel. v. Zangerle*, 94 Ohio St. 447, 115 N. E. 1013.

A vote of the electors to levy a tax to construct a designated kind of road presented by petition, as required, must be confined to the particular kind of road described and cannot be extended to other kinds of roads. *People ex rel. v. Illinois Central R. Co.*, 266 Ill. 240, 107 N. E. 253, 255.

⁹¹ A tax levy must be initiated by ordinance, and not by resolution without the concurrence of the mayor. *New Seattle Chamber of Commerce v. Seattle*, 88 Wash. 620, 153 Pac. 351.

Ordinance, validity as to manner of passage. *Graves v. Georgetown*, 154 Ky. 207, 157 N. W. 33.

motion or resolution, but in whatever form it may be it has the effect of an ordinance and must be subjected to the legislative requirements relating to ordinances.⁹²

Under a law contemplating the enactment of an ordinance "from time to time" for the levying and collection of a poll tax, an ordinance therefor may be passed without a general ordinance on the subject as a basis.⁹³

If a municipality enacts an ordinance providing for the levying of an annual tax to raise a fund to pay interest on a bonded indebtedness, and the principal at maturity, the amount of such indebtedness need not be included each year in the tax levy ordinance.⁹⁴

§ 2405. Same—assessment.⁹⁵

As local laws are so variant concerning the method of assessing property for taxation few general rules can be deduced of practical value. The law applicable,⁹⁶ and the method prescribed therein, of course, it is essential to

⁹² The authorities are united on this question. *Commonwealth ex rel. v. Repp*, 242 Pa. 240, 88 Atl. 1007.

"A tax levy ordinance passed * * * after the appropriation ordinance is passed and signed, but before it has been published for ten days is void. The appropriation ordinance is not in force until ten days after its publication, and a tax levy ordinance passed before the appropriation ordinance is in full force and effect is void." *People ex rel. v. Cleveland C. C. & St. L. Ry. Co.*, 281 Ill. 152, 118 N. E. 1.

⁹³ *Nixa v. Wilson* (Mo. App.), 200 S. W. 703.

⁹⁴ *People ex rel. v. Wabash Ry. Co.*, 281 Ill. 382, 117 N. E. 1048; *Shaver v. Elkhorn Grave*, 275 Ill. 141, 113 N. E. 931; *People v. Cairo*,

Vincennes & Chicago Ry. Co., 265 Ill. 634, 107 N. E. 246.

⁹⁵ *Valdez v. Fish*, 4 Alaska 427; *Ketchikan v. Zimmerman*, 4 Alaska 256; *Standrod v. Case*, 24 Idaho 365, 133 Pac. 651; *Elks Theater Co. v. New Iberia (La.)*, 78 So. 433; *Horgan v. Taylor*, 36 R. I. 232, 89 Atl. 1058; *Leake v. Dallas* (Tex. Civ. App.), 197 S. W. 472; *Montpelier v. Central Vermont Ry. Co.*, 89 Vt. 36, 93 Atl. 1047.

Railroad property. *Ellis v. Atlantic Coast Line R. Co.*, 68 Fla. 160, 66 So. 1005.

Franchise tax. *Kentucky Heating Co. v. Louisville*, 174 Ky. 142, 192 S. W. 4.

⁹⁶ *Charter*, held measure of municipal power, and that general statute was not controlling. *Merrill v. St. Petersburg*, 64 Fla. 367, 60 So. 349.

comply with, in good faith, in making the assessment;⁹⁷ however, non-observance of directory provisions are not fatal.⁹⁸

Assessments by the municipality, including the valuation, must observe the principles requiring a just valuation of all property both real and personal, except such as may be exempt, and the assessment must have a fair relation to a uniform and equal rate of taxation; but the valuations included in the assessments are not always re-

⁹⁷ Method of levy prescribed by law, of course, should be substantially adhered to. *Hyattsville v. Chesapeake & Potomac Tel. Co.*, 131 Md. 589, 103 Atl. 133.

Authentication of assessment roll as a prerequisite to proceeding. *Leonard v. Jaffray*, 175 Cal. 371, 165 Pac. 956.

Assessment upon a pipe line owned by a municipality, but the assessment was made by another municipality. In such case the value of the improvement must be put out of view and the assessment made alone on the land value. *Jersey City v. Huber*, 90 N. J. L. 692, 101 Atl. 378.

What constitutes an assessment, description of property, etc. *Lancaster Sea Beach Imp. Co. v. New York*, 214 N. Y. 1, 108 N. E. 90, affirming 146 N. Y. S. 734, 161 App. Div. 469.

It is not necessary that an assessment shall describe the property assessed, with the certainty required in a deed. It is sufficient if the property can with reasonable certainty be located from the description. *Ludlow v. Ludlow*, 152 Ky. 545, 153 S. W. 783, 786.

Sufficiency of description. *Rudolph Wallach Co. v. Rooney*, 164 N. Y. S. 616, 177 App. Div. 640.

Notice of meeting to assess and impose taxes, sufficiency. *Horgan v. Taylor*, 36 R. I. 232, 89 Atl. 1058.

Notice to raise assessment by board of equalization is a jurisdictional prerequisite. *Huntley v. Board of Trustees*, 165 Cal. 298, 131 Pac. 859.

Increase of assessment by board of equalization, and reassessment, requires notice and failure to give is fatal. *Martin v. Burleigh County*, 38 N. D. 373, 165 N. W. 520.

⁹⁸ *Rudolph Wallach Co. v. Rooney*, 164 N. Y. S. 616, 177 App. Div. 640.

Validity of assessment, necessity of assessment record, and review of assessment. *Story & Clark Piano Co. v. Hilderink*, 189 Mich. 123, 155 N. W. 445.

Irregularities cured by statute of charter. *Cary v. Hatch*, 154 N. Y. S. 759, 91 Misc. Rep. 269.

Assessments are not invalid because the assessors of the village in making up the assessment for two years did not make up an original and independent assessment, but simply copied the valuation as made by the assessors of the town. *Paul v. Huse*, 112 Me. 449, 92 Atl. 520.

quired to be the same as those used for purposes of state taxation. A municipality may be a unit for uniformity and equality of rates of taxation and for just valuations upon one basis of valuations while the state may also be a unit for the application of the same principles of taxation upon a different basis as to valuations. Such distinct units for purposes of taxation are recognized by constitutions.⁹⁹

The property is taxed only, it is generally held, when the tax is levied by the proper public authorities, and not when it is listed and valued for taxation.¹

Local laws govern, of course, as to appeals and reviews.²

§ 2406. Payment and collection.³

If taxes are paid voluntarily they cannot be recovered,

⁹⁹ Merrell v. St. Petersburg, 64 Fla. 367, 60 So. 349; Ellis v. Atlantic Coast Line Co., 68 Fla. 160, 66 So. 1005.

¹ Real property in the city was assessed for taxation, but prior to the fixing of the rate of taxes such property was severed from the city in a legal manner. In such case the tax does not become a lien upon the property so severed. A tax can be levied only on property within the corporate limits. The question is when is the property taxed. Is the property taxed when the assessor lists it and it is valued for taxation, or is it taxed when the levy is made? When it is a question of power to tax that power must exist when it is assumed to exert the power; that is, when the property is taxed. The property is taxed by the city when the city levies the tax. State ex rel. v. Nickerson, 99 Neb. 517, 156 N. W. 1039.

² Appeal from action of board of review. Hawkeye Lumber Co. v. Board of Review, 161 Iowa 504, 143 N. W. 563.

Appeal from assessments allowed to state commission. Hyattsville v. Chesapeake & Potomac Tel. Co., 131 Md. 589, 103 Atl. 133.

Valuation for assessment; failure to appear after notice as preclusion of complaint. Jetts Bros. Distilling Co. v. Carrollton, 178 Ky. 561, 199 S. W. 37.

³ Mandatory provisions of the law must be observed. Wilmington v. Thomas, 5 Boyce (Del. Super.) 243, 92 Atl. 810.

Special method provided for assessing and collecting taxes on whiskey withdrawn from government bonded warehouse. Kraver v. Henderson, 155 Ky. 633, 160 S. W. 257.

Action to recover levy in excess of legal rate. San Christina Inv. Co. v. San Francisco, 167 Cal. 762,

but if paid involuntarily a recovery may often be had.* The controlling facts determine the nature of the payment.

141 Pac. 384, 52 L. R. A. (N. S.) 676.

Correction of error in name of owner of property, as in name of husband instead of wife, as condition to action to collect as provided by statute. Frankfort v. Gordon, 180 Ky. 128, 201 S. W. 472.

Delay in collecting; presumption as to legality of assessment. Martin v. Burleigh County, 38 N. D. 373, 165 N. W. 520.

Presumption of payment after twenty years. Leake v. Dallas (Tex. Civ. App.), 197 S. W. 472.

Illegal taxes involuntarily paid may be recovered. Bush v. Beloit (Kan. 1919), 181 Pac. 615.

Action to recover when paid under protest authorized by statute. Aalwyn's Law Institute v. San Francisco (Cal. App. 1919), 179 Pac. 220.

Refund, no provision for exists in Maine. Arnold v. Augusta (Me. 1919), 108 Atl. 332.

"The rule by which is determined whether such payments were made voluntarily or involuntarily is that, if the assessments can be collected by distraint, they are involuntarily paid, and can be recovered from the county, municipality or taxing district to which paid if paid under the mistaken belief that they were owing when in fact they were not; but if the taxes can only be collected by suit, and the taxpayer has thus the opportunity for a day in court, but instead of resisting the pay-

ment, pays it, the payment is voluntary, and the one paying cannot recover." Greene v. E. H. Taylor, Jr., & Sons (Ky. 1919), 212 S. W. 925, 928.

The payment of taxes in a particular case was held not to be involuntary. "To hold that the imposition of a penalty which is designed to accelerate the prompt payment of taxes, constitutes a duress, would be to render the payment of the great bulk of our taxes involuntarily and subject to be recovered back, and subject the collection of taxes to all the inconveniences and ills as pointed out in a former decision." Phillips v. Portsmouth, 115 Va. 180, 78 S. E. 651, 655, 656.

Action to recover taxes paid under duress of an advertised sale of the property for the tax, on the ground that the tax was void because the property was not assessed for the purpose of taxation as the law required. Lancaster Sea Beach Imp. Co. v. New York, 214 N. Y. 1, 108 N. E. 90, affirming 146 N. Y. S. 734, 161 App. Div. 469.

Action by executrix to recover an overpayment of taxes, denied. Van Pelt v. New York, 155 N. Y. S. 9, 91 Misc. Rep. 550.

A taxpayer may pay an excessive levy under protest and maintain an action to recover the same back. Owings v. Olympia, 88 Wash. 289, 152 Pac. 1019.

Recovery of amount paid in an

In addition to a threat to sell the property or a suit to recover the tax if not paid, it is often held that there must be "some coercion or compulsion which amounts to a duress of the person or property of the payor."⁵

§ 2407. Same—remedies for collection.⁶

Local laws prescribe various remedies for the collection of taxes,⁷ as an action to enforce or collect the tax,⁸ by the

action for money had and received where the tax was void. *People ex rel. v. Prendergast*, 168 N. Y. S. 907.

Statutory proceeding by mandamus to compel officer to certify claim for taxes illegally paid. *People ex rel. v. Prendergast*, 168 N. Y. S. 907.

If there is no law for the payment of taxes under protest and for the recovery thereof after such protest, where the tax is illegal, in the absence of an allegation of duress or coercion they were paid voluntarily and cannot be recovered. *Keyes v. San Francisco*, 177 Cal. 313, 173 Pac. 475, 478.

⁵ *Spencer v. Los Angeles* (Cal. 1919), 179 Pac. 162, 164, following *Phelan v. San Francisco*, 120 Cal. 5, 52 Pac. 38; *Maxwell v. San Luis Obispo County*, 71 Cal. 466, 12 Pac. 484.

⁶ *Re Delinquent Tax Roll*, 4 Alaska 721; *Valdez v. Fish*, 4 Alaska 427; *Rockland v. Farnsworth*, 111 Me. 315, 89 Atl. 65; *State ex rel. v. Dix*, 159 Mo. App. 573, 141 S. W. 445; *Jacobus v. Cahill*, 87 N. J. L. 692, 94 Atl. 802; 87 N. J. L. 562, 94 Atl. 799; *Pittsburgh v. Grenet*, 238 Pa. 567, 86 Atl. 462.

⁷ Usually where the municipal charter provide remedies for the collection of taxes that mode must

be pursued. *Greil Bros. Co. v. Montgomery*, 182 Ala. 291, 62 So. 692, 696.

Remedies provided by charter, held to prevail over general law. *Paepeke Leicht Lumber Co. v. Van Tromp*, 137 La. 743, 69 So. 159.

Charter method controlled and mode provided by general statute, held inapplicable. *O'Connor v. Laredo* (Tex. Civ. App.), 167 S. W. 1091.

Nature of action authorized by the decision of the court of last resort in a state is binding and conclusive in the United States Court. *Bird v. Richmond*, 240 Fed. 545, 153 C. C. A. 349.

Proceedings to collect poll tax, under particular statute. *Page v. Farmery*, 29 N. D. 209, 150 N. W. 471.

Omission of property from taxation, search for such property, action relating thereto. *Richmond v. Clifford*, 182 Ind. 17, 103 N. E. 789, 105 N. E. 385.

⁸ *Illinois*. *People ex rel. v. Chicago, Burlington & Quincy R. Co.* 282 Ill. 206, 118 N. E. 439; *People ex rel. v. Wabash Ry. Co.*, 281 Ill. 382, 117 N. E. 1048.

Kentucky. *Kentucky Heating Co. v. Louisville*, 174 Ky. 142, 192 S. W. 4.

Missouri. *State ex rel. v. Young*, 259 Mo. 52, 167 S. W. 995; *State*

municipality,⁹ in its name,¹⁰ or in the name of the state at the relation and to the use of the city collector,¹¹ action of assumpsit at the suit of the state or municipal corporation,¹² equitable remedy to collect,¹³ action to enforce,¹⁴ or foreclosure of the tax lien.¹⁵

A counterclaim against a village cannot be sustained in an action to recover a tax.¹⁶

ex rel. v. Center Creek Mining Co., 262 Mo. 490, 171 S. W. 356; State ex rel. v. Continental Zinc Co., 272 Mo. 43, 197 S. W. 112.

Texas. San Antonio v. Terrill (Tex. Civ. App.), 202 S. W. 361.

Vermont. Montpelier v. Central Vermont Ry. Co., 89 Vt. 36, 93 Atl. 1047.

When suit to be instituted. Graves v. Georgetown, 159 Ky. 139, 166 S. W. 969.

Action to recover, residence of defendant fact question. Graves v. Georgetown, 154 Ky. 207, 157 S. W. 33.

"In this state taxes assessed against property have always been regarded not only as a lien in rem, but also as a personal debt due from the owner, and collectible by a personal action." Bains Bros. Inv. Co. v. Purdie, 180 Ala. 333, 60 So. 920.

Demand is not required, as taxpayer is presumed to know when taxes are due and payable. Kraver v. Henderson, 155 Ky. 633, 160 S. W. 257.

Demand of payment, held not condition precedent to action. Jetts Bros. Distilling Co. v. Carrollton, 178 Ky. 561, 199 S. W. 37.

⁹ Davies Executor v. Louisville, 171 Ky. 663, 188 S. W. 911.

¹⁰ Recovery of taxes in an action in the name of the municipality

allowed. Montpelier v. Central Vermont Ry. Co., 89 Vt. 36, 93 Atl. 1047.

¹¹ Laws provide for suit in the name of the state at the relation and the use of the city collector, naming him and the city for which he sues. State ex rel. v. Lewis, 256 Mo. 121, 165 S. W. 327.

¹² "An action of assumpsit will lie at the suit of the state or a municipal corporation for the collection of taxes although a statutory action is given." Greil Bros. Co. v. Montgomery, 182 Ala. 291, 62 So. 692, 695.

¹³ Equitable remedies for the collection provided by statute. Vinemont v. Allison, 191 Ala. 316, 68 So. 142.

¹⁴ Suit to enforce tax lien. Ludlow v. Ludlow, 152 Ky. 545, 153 S. W. 783.

Personal judgment authorized. Martin v. Lexington (Ky. 1919), 210 S. W. 483.

¹⁵ Action to foreclose the tax lien. Tax Lien Company v. Schultze, 213 N. Y. 9, 106 N. E. 751.

Suit for taxes, interest and penalties and for foreclosure of tax lien. O'Connor v. Laredo (Tex. Civ. App.), 167 S. W. 1091.

¹⁶ "The obligation of the tax does not rest on contract. It is a statutory liability imposed upon all

§ 2408. Same—sale for unpaid taxes.¹⁷

In the sale of land for taxes great strictness is required. In order to divest an individual of his property against his consent every substantial requirement of the law must be complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes, to cure any radical defect in its proceedings; and the proof of regularity devolves upon the person who claims under the collector's sale. It is said to be an accepted axiom when tax sales are under consideration, that "a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings, but special reasons make it peculiarly to tax sales."¹⁸

Redemption from municipal tax sales are provided.¹⁹

of the inhabitants of the state defined as taxable, to the end that they may contribute their just share to the expenses of the government." The fact that the statute provided that the village might collect the tax in an action "as upon contract," did not change the nature of the obligation. "The intention was to provide an additional and convenient remedy for enforcing the tax. In some municipal charters it has been provided that the taxes upon land may be collected by foreclosure of the tax lien and a sale of the land through an action in equity, as the lien of a mortgage is foreclosed, but with regard to village taxes the legislature gave an action at law in which the judgment may be enforced by execution." "Public policy requires that taxes be paid and that claims against the village

be collected as independent proceedings." "The general rule prevailing throughout the United States is that taxes are not subject to counterclaim or setoff on the part of the taxpayer." *Charlotte v. Koen*, 207 N. Y. 346, 100 N. E. 1116.

¹⁷ *Teat v. Perry* (Tex. Civ. App. 1919), 216 S. W. 650; *Marysville Woolen Mills v. Smith*, 178 Cal. 786, 175 Pac. 13; *Empire Cotton Oil Co. v. Park*, 147 Ga. 618, 95 S. E. 216; *St. Simon's Transit Co. v. Brunswick*, 141 Ga. 477, 81 S. E. 199; *Horgan v. Taylor*, 36 R. I. 232, 89 Atl. 1058.

Injunction to enjoin sale denied. *Cochran v. Lanfair*, 139 Ga. 249, 77 S. E. 95.

¹⁸ *Greil Bros. Co. v. Montgomery*, 182 Ala. 291, 62 So. 692, 695, 696, citing *Cooley on Taxation*, 324.

¹⁹ *Bains Bros. Inv. Co. v. Purdie*,

§ 2409. Forfeiture and penalties for nonpayment.²⁰**§ 2410. Remedies against municipality where tax wrongful.²¹**

Equity will restrain the assessment and collection of taxes for local purposes where the taxing authorities had no power to levy and collect the tax. Where there is want of power to tax or the tax is levied without authority of law a bill in equity will lie to restrain its collection. If the tax is lawful, but the manner of collecting it is oppressive or unfair, or there are technical irregularities in

180 Ala. 333, 60 So. 920; *Jacobus v. Cahill* (N. J. L.), 91 Atl. 135.

The redemption must be effectuated as the statute declares by payment to the purchaser at the tax sale or as prescribed by law, the amount due, etc. *Braceley v. Noble* (Ala.), 77 So. 368.

²⁰ Delinquency as ground for imposition of penalty. *Jetts Bros. Distilling Co. v. Carrollton*, 178 Ky. 561, 199 S. W. 37.

Penalty applies to franchise tax. *Kentucky Heating Co. v. Louisville*, 174 Ky. 142, 192 S. W. 4.

Penalty for non-payment of delinquent taxes. *Valdez v. Fish*, 4 Alaska 427; *Nome v. Orland*, 4 Alaska 478.

A municipality cannot prescribe penalty for failure to pay taxes promptly unless authorized to do so. *Burns v. Nashville* (Tenn. 1920), 221 S. W. 828, 839, citing § 2409, vol. 5, ante.

²¹ Suit to recover taxes paid under unlawful assessment. *Horgan v. Taylor*, 36 R. I. 232, 89 Atl. 1058.

Bill for injunction on ground that taxes had been paid. *Erie Elevator Co. v. Jersey City*, 83 N. J. Eq. 71, 90 Atl. 8.

The sole remedy against the attempted collection of taxes illegally assessed, in New Jersey, is to apply for a certiorari to the Supreme Court. *Roe v. Jersey City*, 79 N. J. Eq. 645, 82 Atl. 873, following *Jersey City v. Lembeck*, 31 N. J. Eq. 255.

Action against the municipality to compel the determination of the question as to whether certain unpaid taxes were liens. *Hall v. Lockport*, 153 N. Y. S. 298, 90 Misc. Rep. 429.

In a suit to enjoin the collection of a tax, held that the unconstitutionality of the law under which the municipality levying the tax was organized could not be drawn into question. *Morgan's Louisiana & T. R. R. & S. S. Co. v. White*, 136 La. 1074, 68 So. 130.

Relief denied where taxpayer failed to avail himself of remedies allowed after expiration of a year and a second tax bill became due. *Clark County National Bank v. Winchester*, 177 Ky. 532, 197 S. W. 1077.

Property owner failing to avail himself of the remedies afforded for correction of errors and irregularities in tax proceedings, cannot

the assessment, usually as in Pennsylvania, the remedy is at law and by an appeal from the assessment.²²

Injunction will usually lie to restrain the collection of an excessive and illegal tax.²³

And this remedy has been granted to enjoin the enforcement of taxes on the ground of arbitrary, oppressive and illegal discrimination,²⁴ and on the ground of error in valuation and unjust discrimination.²⁵

An increase of the assessment, without notice to the landowner, it has been held, authorizes an injunction.²⁶

complain. The decision of the public officers in such matters is not open to collateral attack, as for example, in proceedings to enjoin the sale of the property for taxes. *Leary v. Jersey City*, 126 C. C. A. 12, 208 Fed. 854, affirming 189 Fed. 419.

Injunction against collection of taxes on ground of wrongful assessment, the petition should point out taxes which are municipal in character and those which should be levied under the general revenue law, and complainant should tender the amount due for such taxes as were legally imposed. "In all matters pertaining to taxation a party who seeks equitable relief against an assessment of which he complains must himself offer to do equity by offering to pay the amount of taxes which the facts show would be properly chargeable against him under a proper assessment." *Collinsville v. Ward* (Okla.), 165 Pac. 1145.

²² *Pittsburgh, A. & M. R. Ry. Co. v. Stowe Tp.*, 252 Pa. 149, 97 Atl. 197.

²³ *St. Louis & San Francisco R. Co. v. Tate*, 35 Okla. 563, 130 Pac. 941; *Lancaster v. Pope*, 156 Ky. 1, 160 S. W. 509.

Bill to restrain sale of personal property for taxes on ground of invalidity of assessment. *Catts v. Smyrna* (Del. Ch.), 91 Atl. 297.

²⁴ "The right to an injunction to restrain the collection of a tax illegal by virtue of an arbitrary discrimination against the taxpayer in the property valuation is well settled." *Sweetwater v. Biard Development Co.* (Tex. Civ. App.), 203 S. W. 801.

²⁵ *Jersey City v. Central R. Co. of New Jersey*, 212 Fed. 76, affirming 199 Fed. 237.

²⁶ As where assessors agreed with landowner that the valuation determined upon should prevail, and where collection of taxes on the property is grounded on increase of valuation without notice to complainant. "The rule is well settled that notice and an opportunity to be heard are essential to the validity of every assessment. * * * It would be contrary to reason and the first principles of justice to assess property for taxation without notice to the owner and an opportunity for a hearing." *Havre De Grace v. Lewis*, 127 Md. 367, 96 Atl. 515, 517, per *Briscoe, J.*

§ 2411. Same—action for damages.²⁷**§ 2412. Disposition of taxes after collection.²⁸**

²⁷ Assumpsit for loss alleged to have been sustained by reason of an inaccurate tax search, denied. *Philadelphia v. Black*, 63 Pa. Super. Ct. 420.

²⁸ *Spitzer v. El Reno*, 41 Okla. 430, 138 Pac. 797; *Roney v. Lane County*, 81 Ore. 372, 159 Pac. 73.

Recovery of excess tax paid in view of statute validating certain excess tax levies. *Northern Pacific Ry. Co. v. Snohomish County*, 101 Wash. 686, 172 Pac. 878.

“Cities are mere instrumental-

ities of the state for the convenient administration of government; and their powers may be qualified, enlarged or withdrawn at the pleasure of the legislature, and the revenues of a city raised by taxation, though levied for specific public purposes, are so far subject to the legislative will that by it they may be applied to other uses of the municipality, subject of course, to constitution limitations.” *Reno v. Stoddard*, 40 Nev. 537, 167 Pac. 317.

CHAPTER 45.

FIRE AND POLICE DEPARTMENTS.

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| § 2413. Fire department. | § 2425. Criminal responsibility. |
| § 2414. Police force in general. | § 2426. Powers, rights and duties of police. |
| § 2415. Same — police commissioners. | § 2427. Same—right to enter premises without warrant. |
| § 2416. Same—chief of police. | § 2428. Same—powers of police officer to arrest. |
| § 2417. Policemen and firemen as “public officers.” | § 2431. Liability of municipality for torts of policemen. |
| § 2418. Legislative control of fire and police departments. | § 2431a. Liability on bonds of policemen. |
| § 2419. Who may appoint policemen and firemen. | § 2432. Liability of municipality for torts of fire department. |
| § 2420. Removal or suspension. | |
| § 2421. Salaries and compensations. | |
| § 2422. Pensions. | |
| § 2424. Personal liability of policemen and firemen for their acts. | |

§ 2413. Fire department.

The creation and composition of the fire department,¹ whether it is under the control of the state, in whole or in part, or under the exclusive control of the local community;² the appointment and advancement in grade,³

¹ Composition of under particular law. *McCarthy v. Board of Fire Commissioners of San Francisco* (Cal. App.), 174 Pac. 402.

Law authorizing town to establish. *Wygant v. Hackensack Imp. Com.*, 89 N. J. L. 454, 98 Atl. 477.

² Department of city. *McCarthy v. San Francisco Board, etc.* (Cal. App.), 174 Pac. 402; *Fisk v. Worcester*, 219 Mass. 428, 106 N. E. 1025.

Fire department is a department

of the city, and is distinctively a concern of the inhabitants of the city as an organized community apart from the people of the state at large, peculiarly within the field of municipal activity and local self-government. *Simpson v. Gage*, 195 Mich. 581, 161 N. W. 898, citing section 173, vol. 1, ante, holding unconstitutional legislative act attempting to regulate leave of absence of members of the Saginaw fire department.

³ Civil service regulation as to

and the regulation of the hours of service of the members thereof,⁴ and the management generally are all matters controlled by the local laws.⁵

§ 2414. Police force in general.

The police force of local communities is usually under the supervision and control, in whole or in part, of the state, and is generally recognized as an agency of the state.⁶

However, in many cities and towns, local control prevails.⁷

In the absence of a statute or ordinance creating the office or position of police patrolman, usually it cannot

appointment of members. *McCarthy v. Board of Fire Comrs. of San Francisco* (Cal. App.), 174 Pac. 402.

Provisions for advancement in grade is made. *Lowery v. New York*, 166 N. Y. S. 400.

⁴ Regulations as to hours of firemen. *Stetson v. Seattle*, 74 Wash. 606, 134 Pac. 494.

Firemen held not "laborers" limiting day's work to eight hours. *Neely v. Tacoma*, 78 Wash. 92, 138 Pac. 557.

"The matter of fire protection being a matter in which all members of the community are interested it follows that all citizens and taxpayers within the city have an interest in the equipment and management of the fire department."

Laws require councils to adopt rules and regulations for the government of the fire department and to provide that no fireman, except the chief and assistant chief shall be required to work more than twelve hours continuously in any one day. This statute was held

mandatory. *State ex rel. v. Lincoln*, 98 Neb. 634, 154 N. W. 217.

⁵ Apportionment of money paid by fire insurance companies pursuant to statute. *Cary v. Oneida*, 144 N. Y. S. 57, 158 App. Div. 773.

⁶ Section 181, ante.

Metropolitan; created by state law; act named chief of police, other officers to be created by city council; civil service to prevail. *State ex rel. v. Duncan*, 49 Mont. 54, 140 Pac. 95.

Police commissioners held not constitutional officers, and hence, legislature could prescribe qualifications. *State v. Canavan*, 155 Wis. 398, 145 N. W. 44.

⁷ *McCarthy v. San Francisco* (Cal. App.), 174 Pac. 402.

Municipal, established by ordinance, by virtue of authority of statute. *Moore v. Bradley Beach Borough*, 87 N. J. L. 391, 94 Atl. 316.

City has full control over police force through mayor and legislative body. *Lumpkin v. Rome*, 113 Ga. App. 281, 79 S. E. 158.

Charter gave city council power

exist; it cannot be created by mere resolution of the legislative body.⁸

Non-political control and the merit system in the management of the police force is generally sought to be secured.⁹

by ordinance to establish a police department and regulate the same. Office of patrolman must be created by ordinance. An ordinance stating the composition of the police force, concluding and such "Patrolmen as the mayor and city council shall deem necessary" did not create the office of patrolman or policeman. *San Antonio v. Coultriss* (Tex. Civ. App.), 169 S. W. 917, 919.

Private detectives or detective agencies; regulation of, by municipality. *Lehon v. Atlanta*, 16 Ga. App. 64, 84 S. E. 608.

"The position of policeman or patrolman was unknown to the common law. It is a creation of municipal government, by ordinance derived from authority granted in charters to cities, or by statutory authority for the government of municipalities operating under the general law. The city of San Antonio operates under a charter which contains its authority for the establishment and maintenance of a police department." *San Antonio v. Coultriss* (Tex. Civ. App.), 169 S. W. 917, 919.

In *Montana*, by statute the supervision of the police force is confided to the mayor, and in addition to certain statutory regulations and restrictions the city or town council may make any ordinance, not inconsistent with the state provisions, for the government of the police department, and

for regulating the powers and duties of its officers and members. Such grant of power, it has been held, is sufficient for a council to provide by ordinance a commission to aid the mayor in determining the physical competency of the members of the force. *Larkin v. Butte*, 52 Mont. 410, 158 Pac. 316.

⁸ *Gillen v. Chicago*, 177 Ill. App. 318.

⁹ Civil service regulations are usually applicable to the police department, but the head thereof as the chief is often excepted, and also other officers. The legislative intent is often construed to be that the civil service rules should apply to all members of the police department, regardless of the manners of their election, appointment and confirmation. *Ellis v. Civil Service Com.*, 229 Mass. 147, 118 N. E. 231.

Non-political control. A law was held unconstitutional on the ground that it unlawfully limited the eligibility to the office of police commissioners to adherents of the two political parties having the highest representation in the common council and was an unreasonable restriction upon local self-government. But the Supreme Court of Wisconsin sustained such law on the ground that it provided merely for diversity of representation and excluded no one, whether an adherent of any or of no political party from being eligible. The

The management of the police force including appointments,¹⁰ promotions¹¹ and discipline¹² depends alone on the proper construction of the applicable local laws. Within the meaning of particular laws in certain relations policemen are regarded as public officers,¹³ e.

law does not exclude anyone for eligibility, on the other hand, its aim is to compel reasonable diversity of representation. The decisions differ on the point. *State ex rel. v. Kotecki*, 155 Wis. 66, 144 N. W. 200.

Laws provide that members once appointed after their probationary service, shall hold office during good behavior, or until by age or disease they become permanently incapacitated to discharge their duties; that no member or officer of the police force in certain cities shall be discharged without a hearing or trial. Under general authority of a council to make ordinances not inconsistent with the state act or the laws of the state for the government of the police department and for regulating the powers and duties of its officers and members, it is competent to provide by ordinance for a commission to aid city officers in the physical examination of policemen. *Larkin v. Butte*, 52 Mont. 410, 158 Pac. 316.

¹⁰ Laws fix the age of policeman when appointed or when on the eligible list, often at the age of thirty, not to exceed that. *People ex rel. v. Creelman*, 134 N. Y. S. 395, 149 App. Div. 716.

¹¹ Regulation of promotional examination. As a condition, regulations prescribe often a continuous service in the department in some position, e. g. examination for the

position of captain can be had only by one who has served in a lower position as lieutenant. *People ex rel. v. Feldman*, 221 N. Y. 655, 117 N. E. 1081, affirming 166 N. Y. S. 375, 179 App. Div. 295.

¹² Laws often forbid members of the police force to make presents, bestow testimonials, collect or receive money or any thing from citizens or others, circulate subscription paper or books or sell tickets for any purpose. Laws of this character as expressed by judicial opinions ought not to be strictly construed or construed absurdly. They should be reasonably construed. "Under a strict construction a policeman would not be permitted to make a present to his wife or to his child, or to collect or receive money justly owing him, without first procuring the permission of the police commissioner." *People ex rel. v. Waldo*, 151 N. Y. S. 1034, 166 App. Div. 196.

¹³ *Blynn v. Pontiac*, 185 Mich. 35, 43, 151 N. W. 681, citing § 2414, vol. 5, ante; also § 424, vol. 2, ante.

In many respects a policeman is a municipal officer, but in other and important respects the legislature and courts have raised him out of the class of a mere subordinate or employee like a field man of a local department of health, or a cellhouse man at the penitentiary. A policeman is a conservator of the peace and exercises many of

g., not within the scope of civil service regulations.¹⁴ They are either state or municipal officers, and sometimes both.

§ 2415. Same—police commissioners.

When created by state law, apart from restrictions therein, police commissioners “are not the agents of the city; they are public governmental officers over whom the city has no control, and for whose conduct it is not responsible.”¹⁵

Under a law providing that the governor may remove a police commissioner “upon his being fully satisfied” of “the alleged misconduct” of such commissioner, it was held that a police commissioner was removable by the governor at will without any other formality than the exertion of discretionary power.¹⁶

§ 2416. Same—chief of police.¹⁷

§ 2417. Policemen and firemen as “public officers.”

the functions of sovereignty and important duties are imposed upon him by the legislature. “This court has frequently recognized police officers as exercising the functions of sovereignty; and, being clothed with such extensive powers they must be considered public officers.” * * * There is no want of authority that a policeman is a public officer.” *Haney v. Cofran*, 94 Kan. 332, 146 Pac. 1027.

¹⁴ In *Kansas*, it has been held that a policeman is an officer and not within the scope of the civil service regulations, and as his term is not fixed he holds in conformity with the constitution, “during the pleasure of the authority making his appointment.” *Haney v. Cofran*, 94 Kan. 332, 146 Pac. 1027.

¹⁵ *Gibbs v. Manchester*, 73 N. H. 265, 269, 61 Atl. 128, 130.

“As they are not the servants or agents of the city, no agreement on its part to indemnify them could be inferred or implied because of the relationship.” *Gilbert v. Berlin*, 76 N. H. 470, 84 Atl. 235, 237.

¹⁶ *State ex rel. v. Crandall*, 269 Mo. 44, 50, 190 S. W. 889.

¹⁷ Chief of police under particular law held the head of the police department, and hence he fell under the unclassified service under civil service law applicable. His appointment is frequently expressly committed to the board of police commissioners, and sometimes he is appointed by the mayor and confirmed by the legislative body. *Civil Service Commission v. O'Neill*, 85 N. J. L. 92, 88 Atl. 946, 91 Atl. 643.

It is generally recognized that a policeman is a public officer.¹⁸

§ 2418. Legislative control of fire and police departments.

The power of the state to control the police force of its cities and towns is well settled.¹⁹

Sometimes the control is committed to the local communities.²⁰

¹⁸ *State v. Shores*, 48 Utah 76, 157 Pac. 225, citing § 2417, vol. 5, ante; *Haney v. Cofran*, 94 Kan. 332, 146 Pac. 1027.

Policemen, held public officers, and not employees, and not entitled to compensation under Michigan Workmen's Compensation Law. *Blynn v. Pontiac*, 185 Mich. 35, 42, 43, 151 N. W. 681, citing § 2417, vol. 5, ante; also § 424, vol. 2, ante.

¹⁹ *State ex rel. v. Jost*, 265 Mo. 51, 175 S. W. 591.

Police department created by state statute which frequently authorize the police commissioners to estimate the amount necessary to conduct the department and such estimate is sent to the appropriate corporate authorities and such authorities must make the necessary recommendation and appropriation. This may be done by the council or a particular board as a board of estimates. The police board is commonly a state board. The members are appointed often by the governor. *McEvoy v. Baltimore*, 126 Md. 111, 94 Atl. 543.

Municipal officers. "As a policeman is elected or appointed by a city and his salary is paid by a city and most of his duties are municipal, he is in a proper sense

a city officer, although he is a peace officer and may make arrests under state laws." *Branch v. Albee*, 71 Ore. 18, 142 Pac. 598, 601, quoting with approval from § 100, vol. 1, ante.

²⁰ Some laws permit the legislative or governing body of incorporated towns to pass, amend and repeal ordinances relating to the establishment, regulations and control of the police and to regulate and define the manner of their appointment and removal, their duties and compensation. Under such authority the appropriate corporate authorities may reorganize the police in the interest of the public within their discretion. However, it must be done in good faith and for not partisan purposes. Such power is authority to abolish a police department. *Buckley v. Guttenburg*, 87 N. J. L. 434, 95 Atl. 120.

The laws confer power on the corporate authorities, as the legislative body to establish a police department. Sometimes these laws require the appropriation for the support of the department to be made by the electors. Under such law in one case it was held that the appropriation was not a prerequisite to the establishment of

§ 2419. Who may appoint policemen and firemen.²¹

The governance of the police department is commonly vested in a board of police commissioners, sometimes under state laws and sometimes under municipal charters, and usually the board has power to make such rules and regulations as it may deem proper for the regulation of the police department. In the exercise of this power often the board may adopt a manual of rules and regulations providing among other things how the police force shall be constituted, as by a chief of police, captains, detective sergeants, sergeants, detectives, patrol men, etc. Laws on the subject are construed as to their intent. They vary materially. The power of the board to make appointments, and reduce officers is generally very broad.²²

the department by the legislative body and the appointment of policemen. *Hermann v. Guttenburg*, 86 N. J. L. 681, 94 Atl. 308.

"A city's fire department is distinctively a matter which concerns the inhabitants of the city as an organized community apart from the people of the state at large, peculiarly within the field of municipal activity and local self government." *Simpson v. Gage*, 195 Mich. 581, 161 N. W. 898, citing § 173, vol. 1, ante, holding legislative act regulating leave of absence of members of fire department of Saginaw unconstitutional.

²¹ Definite number provided. *State ex rel. v. Jost*, 265 Mo. 51, 175 S. W. 591.

Policemen are usually appointed by police commissioners. *Baker v. Nashua*, 77 N. H. 347, 91 Atl. 872.

If law vests power of appointment in commissioners, an ordinance giving such power to the mayor is void. *Uhr v. Lambert* (Tex. Civ. App.), 188 S. W. 946.

Sometimes the mayor makes the

appointments, and under some laws in the matter of appointments the authority of the mayor is limited only in that his selection of the appointee must be made from a list of competent persons certified to him by the civil service commission. *Ellis v. Civil Service Com.*, 229 Mass. 147, 118 N. E. 231.

Municipal, where city through mayor and council has full control, often policemen may be appointed and removed at pleasure. *Lumpkin v. Rome*, 13 Ga. App. 281, 79 S. E. 158.

In smaller cities, laws confer power upon the marshal to appoint his deputies, subject to approval of the legislative body. *Commonwealth v. Boles*, 160 Ky. 775, 170 S. W. 170.

The appointment of a patrolman in the place of one illegally removed, as a removal without cause in violation of express law, is illegal. *Ducharme v. Biddeford*, 110 Me. 6, 85 Atl. 157.

²² *Gutheil v. Nelson*, 86 N. J. L. 1, 91 Atl. 93.

§ 2420. Removal or suspension.

The tenure of office, place or position of policemen or firemen,²³ their suspension,²⁴ or removal with,²⁵ or with-

²³ The terms of police officers expire with the term of office of the board appointing them. *Haney v. Cofran*, 95 Kan. 335, 148 Pac. 640, 94 Kan. 332, 146 Pac. 1027.

Conviction of a police officer of a felony or a violation of official duty vacates the office. *MacPhee v. San Francisco Board of Police Comrs.* (Cal. App.), 171 Pac. 1086.

Under some civil service laws firemen may be removed for economical reasons after a hearing. *Durkin v. Newark Fire Comrs.*, 90 N. J. L. 670, 101 Atl. 1053 affirming 89 N. J. L. 468, 99 Atl. 432.

Resignation. The policeman presented a resignation and withdrew it. The court held this proper as the resignation could not take effect until acted upon, and its manner of presentation would not work a vacancy in the place. The court expressed the opinion that the policeman had the right to withdraw the resignation at any time before its acceptance. "In the absence of a statute provision in cases of the kind a resignation is not complete until it is accepted by competent authority—in this instance the appointing power. As neither the petitioner or the defendant on their own motion can create a vacancy, it follows that the term of service of the petitioner was not legally terminated, either by the alleged resignation or by the subsequent attempt to remove him." *Dostie v. Lewiston*, 114 Me. 62, 95 Atl. 353.

²⁴ Suspension by chief or board

without charges. *State ex rel. v. La Crosse Board, etc.*, 159 Wis. 295, 150 N. W. 493.

Mayor may on charges filed, suspend a member of police force, with or without pay, pending the result of an investigation by him or a trial, as provided, etc. *Hess v. Roberson*, 67 Fla. 45, 64 So. 449.

²⁵ Cause only. *Ducharme v. Biddeford*, 110 Me. 6, 85 Atl. 157; *Hess v. Roberson*, 67 Fla. 45, 64 So. 449; *Donovan v. San Francisco Board of Police Comrs.*, 32 Cal. App. 392, 163 Pac. 69; *State ex rel. v. Burney*, 269 Mo. 602, 191 S. W. 981.

Only on notice and hearing. *People ex rel. v. Beach*, 203 N. Y. 620, 97 N. E. 39, reversing 128 N. Y. S. 412, 143 App. Div. 712.

Removal or suspension only on written charges, notice and opportunity to be heard. *Garvin v. McCarthy*, 39 R. I. 365, 97 Atl. 881; *People ex rel. v. Waldo*, 212 N. Y. 156, 105 N. E. 961, 965; *People ex rel. v. Woods*, 159 N. Y. S. 300, 173 App. Div. 355.

Action without charges in writing as required by law is without jurisdiction and void. *State ex rel. v. La Crosse Board, etc.*, 159 Wis. 295, 150 N. W. 493.

Forbidding for political reasons or for any other cause than incapacity, misconduct, nonresidence or disobedience of just rules, regulations, etc. *Herbert v. Atlantic City*, 87 N. J. L. 98, 93 Atl. 80.

Cause, of course, must be substantial. Dismissal on trivial

out cause,²⁶ the authority to exercise such power,²⁷ the applicability and extent of civil service laws, rules and regulations,²⁸ are ordinarily prescribed and regulated in more or less detail by the controlling local laws.²⁹

charges is in violation of law. *People ex rel. v. Tinney*, 172 N. Y. S. 476.

Discretion of commissioners as to delinquency justifying dismissal. *People ex rel. v. Waldo*, 212 N. Y. 175, 105 N. E. 829.

Misconduct. *People ex rel. v. Waldo*, 212 N. Y. 156, 105 N. E. 961, affirming 143 N. Y. S. 1138, 159 App. Div. 901.

Misconduct, acting as collector for a bawdy-housekeeper, is sufficient. *Herbert v. Atlantic City*, 87 N. J. L. 98, 93 Atl. 80.

Dealing in city warrants. *State ex rel. v. Butte*, 54 Mont. 533, 172 Pac. 134.

"The virtue of a fireman is in being at the scene of the fire in the shortest possible space of time after the fire is discovered and any employment of an assistant engineer which materially interfered with his duty was inconsistent with the employment by the city, and was a justification for his removal." *People ex rel. v. Tinney*, 172 N. Y. S. 355.

²⁶ Summary removal, not allowed. *Moore v. Bradley Beach Borough*, 87 N. J. L. 391, 94 Atl. 316.

A policeman may be removed at any time for cause or without cause, as the city government may elect, and courts are powerless to review or interfere with the action of the city government in that respect. *Glenn v. Park*, 48 Utah 160, 158 Pac. 425; *Skeen v. Brown*, 32 Utah 164, 89 Pac. 642.

²⁷ Selectmen, and not the voters at a town meeting, held had power to remove engineer in a fire department. *State ex rel. v. Wilkinson*, 88 Conn. 300, 90 Atl. 925.

Mayor and council given authority to remove policemen at pleasure, though appointed for a definite term, by the police commissioners under prior law, where the amended law gave plenary control of the police to the municipality through the mayor and council. *Lumpkin v. Rome*, 13 Ga. App. 281, 79 S. E. 158.

²⁸ Civil service laws apply. *Gallagher v. Blankenburg*, 248 Pa. 394, 94 Atl. 132; *People ex rel. v. Beach*, 203 N. Y. 620, 97 N. E. 39; *Barnes v. Rivers*, 213 Mass. 1, 99 N. E. 464; *Karb v. State*, 87 Ohio 197, 100 N. E. 346; *O'Brien v. Cadogan*, 220 Mass. 578, 108 N. E. 363.

In the matter of removals under the civil service rules formal charges must be preferred and an opportunity for a public hearing. *Ellis v. Civil Service Com.*, 229 Mass. 147, 118 N. E. 231.

Officers of the fire department, as captains who are not civil service employees under some laws may be discharged at any time without charges or a trial before a board as the civil service commissioners. *Weydert v. Chicago*, 201 Ill. App. 616.

²⁹ Applicable law, of course, controls. *Finneran v. Burlington*, 89 Vt. 1, 93 Atl. 254.

In Montana members of the po-

Policemen or firemen may be legally suspended or removed only under the conditions and in the manner pointed out by the local laws and regulations applicable,³⁰ and by the officer, board or tribunal designated.³¹

§ 2421. Salaries and compensation.³²

To entitle a policeman or fireman to recover a salary or compensation for services performed, the general rule

lice force once appointed after their probationary service, shall hold office during good behavior, or until by age or disease they become permanently incapacitated to discharge their duties, and no member or officer of the police force in a city of the first class shall be discharged without a hearing or trial before the examining and trial board. Provision for charges and for the trial and determination thereof is made. *Larkin v. Butte*, 52 Mont. 410, 158 Pac. 316.

³⁰ *Moore v. Bradley Beach Borough*, 87 N. J. L. 391, 94 Atl. 316.

Proceedings are judicial in character. *Garvin v. McCarthy*, 39 R. I. 365, 97 Atl. 881; *People ex rel. v. Waldo*, 212 N. Y. 156, 105 N. E. 961, 966.

³¹ *Foley v. Orange*, 91 N. J. L. 554, 90 N. J. L. 109, 103 Atl. 743; *Crane v. Jersey City*, 92 N. J. L. 248, 103 Atl. 678; *Brennan v. Jersey City* (N. J. L.), 104 Atl. 90; *Apple v. Atlantic City* (N. J. L.), 104 Atl. 89.

³² Policemen regularly appointed who have performed the duties of their offices, authorizes the conclusion that they are entitled to their pay. *Baker v. Barry*, 77 N. H. 198, 90 Atl. 180.

A policeman may recover his salary after an attempted removal which fails for illegality. *Finneran v. Burlington*, 89 Vt. 1, 93 Atl. 254, citing § 520, vol. 2, ante.

"A *de facto* officer has no legal right to the emoluments of an office the duties of which he may have performed under color of an appointment, but without legal title." *Ducharme v. Biddeford*, 110 Me. 6, 85 Atl. 157.

De jure policemen, held entitled to salary where they were appointed by the police board in good faith although they did not perform the duties of the office because performed by *de facto* officers. "Although some courts hold that a *de jure* officer cannot recover under some circumstances when the salary has been paid to *de facto* officer without notice of the former claims, most courts hold that the simple fact that an officer *de jure* has not performed the duties of his office is no defense to an action to recover the salary attached to the office." *Baker v. Nashua*, 77 N. H. 347, 91 Atl. 872.

Extra pay for extra services is sometimes allowed on named conditions, as that the bill for such services be approved by the marshal or the police commission. Without approval extra cannot be

is the office or place filled by the claimant must exist, and the applicable law must authorize its payment.³³

"There is no such relation between the city and the officers which it is required by law to elect or appoint as will oblige it to make compensation to them for their official services unless provision is made therefor by law, ordinance or contract. And when such provision is made, the right of recovery for services, and the amount, are determined, limited and regulated by its express terms."³⁴

§ 2422. Pensions.³⁵

Pensions are in the nature of bounties of the govern-

legally allowed. *Quinn v. Badger*, 77 N. H. 119, 88 Atl. 1000.

³³ Where one brings action to obtain a salary of an office it is incumbent upon him to show the legal existence of the office and his right to hold it, hence, one cannot recover salary for the office of sergeant of police unless such office has been legally created. *Harnett v. Chicago*, 204 Ill. App. 252.

³⁴ *Riopel v. Worcester*, 213 Mass. 15, 99 N. E. 478, stating: "Nor can there be a recovery on a quantum meruit, especially in the absence of any evidence as to the value of his services."

³⁵ Section 511, ante; § 511, vol. 2, ante; *Van Dyke v. Long Branch Comrs.*, 88 N. J. 492, 96 Atl. 671.

May retire and be placed on retired list on a pension after service for 21 years as fireman, with honorable discharge. "It is proper that those who risk their health and their lives to protect the property of their neighbors should be rewarded in old age by a pension

which may possibly save them from actual want or serious distress." *State ex rel. v. Love*, 95 Neb. 573, 145 N. W. 1010.

Police pension fund act, held mandatory requiring setting aside money, as provided. *People v. Abbott*, 274 Ill. 380, 113 N. E. 696.

Delay of over two years in instituting suit to recover pension, held not barred. *People v. Armstrong*, 196 Ill. App. 199.

Policeman's widow often given pension. *People v. Armstrong*, 196 Ill. App. 199; *Maitland v. Garfield Board, etc.*, (N. J. L. 1919), 107 Atl. 411.

Firemen. *Seanert v. Cooper* (Iowa 1919), 175 S. W. 19.

Pension to widow of fireman. *Hammond v. Fulton*, 220 N. Y. 337, 115 N. E. 998, reversing 163 N. Y. S. 51, 176 App. Div. 343.

Adopted child, rights of. *Ryan v. Foreman*, 262 Ill. 175, 104 N. E. 189, affirming 181 Ill. App. 262.

Member of fire department killed while off duty in a personal quarrel not connected with the de-

ment which it has the right to give, withhold, distribute or recall at its discretion.³⁶

Hence, the law as to pensions existing at the time one enters into public service does not form a part of the contract of employment in the sense that the rights to

partment, held his widow and children not entitled to pension under applicable law. *State ex rel. v. Board of Trustees, etc.*, 192 Mo. App. 583, 184 S. W. 929.

Fireman lost his life while discharging his duties as one of the callmen, and the law provided that the callmen shall be entitled to the same privileges and exemptions as are accorded by the laws of the state to volunteer firemen. The claim was presented by his widow as administratrix. *Hammond v. Fulton*, 220 N. Y. 337, 115 N. E. 998, Ann. Cas. 1917C, 1137, reversing 163 N. Y. S. 51.

The allowance of a pension although discretionary by a police board, may not be revoked by a later board. *Boards of Police Comrs. v. McClenehan (Md.)*, 101 Atl. 786.

Under some laws when one voluntarily retires as an active member of the fire department, unless due to incapacity, he ceases to remain a member of the relief association, and, hence, is not entitled to a pension. *Schwartz v. Minneapolis F. D. R. Assn.*, 137 Minn. 399, 163 N. W. 744.

Application and conditions necessary to obtain pension. *Davis v. Minneapolis F. D. R. Assn.*, 137 Minn. 397, 163 N. W. 743; *Moffatt v. O'Donnell*, 215 Mass. 92, 102 N. E. 344.

Right to pension may be barred by limitations. *Lund v. Minne-*

apolis F. D. R. Assn., 137 Minn. 395, 163 N. W. 742.

Waiver of right to pension will not arise by the policeman instituting suit for reinstatement. *Stiles v. Board of Trustees, etc.*, 281 Ill. 636, 118 N. E. 202.

Members of the fire alarm department, entitled to membership in relief funds under particular statute. *Frickett v. Boston Firemen's Relief Fund*, 220 Mass. 319, 107 N. E. 957.

Police commissioners in examining witness and holding hearings as to the payment of certain death pension claim exercise not judicial, but ministerial powers only. *French v. Cook*, 173 Cal. 126, 160 Pac. 411.

Certain fees earned by salaried policemen, to be paid into their pension fund. *State ex rel. v. Oshkosh*, 166 Wis. 391, 166 N. W. 37.

Widow of deceased fireman, held to have a pension separate from that to fireman. *Gibbs v. Minneapolis Fire Dept.*, 125 Minn. 174, 145 N. W. 1075.

Laches as bar to recovery by policeman's widow. *McGurty v. Newark*, 90 N. J. 103, 100 Atl. 849.

³⁶ *Pecoy v. Chicago*, 265 Ill. 78, 106 N. E. 435; *Stiles v. Board of Trustees, etc.*, 281 Ill. 636, 118 N. E. 202, 204; *Ryan v. Foreman*, 262 Ill. 175, 104 N. E. 189, Ann. Cas. 1915B, 780.

the benefits which would accrue under the then existing law are vested property rights of which such person can not be deprived by any subsequent act of the legislature.³⁷

“Such pensions generally are not considered donations or gratuities. The rule in the majority of the jurisdictions is that the legislature has power to require municipalities to pension their employees and raise the fund for that purpose.”³⁸

“A pension is a gratuity only where it is granted for service previously rendered and which at the time they were rendered gave rise to no legal obligation,” but where rendered under a statute allowing pensions, etc., it was stated in a California case, the pension becomes a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself.³⁹

As a pensioner has no vested right in his pension, the legislature which created it can recall its bounty at its discretion.⁴⁰

The words “pension” and “compensation” are not synonymous, nor is the plan and purpose which underlie the workmen’s compensation act necessarily identical with those which induce the establishment of a pension fund. Hence, compensation for injuries given a policeman under the latter act, it is held, will not bar him from becoming a beneficiary in the pension fund provided, if he is otherwise entitled.⁴¹

§ 2424. Personal liability of policemen and firemen for their acts.⁴²

A policeman is liable for using unnecessary force in

³⁷ *Pecoy v. Chicago*, 265 Ill. 78, 106 N. E. 435.

³⁸ *People ex rel. v. Abbott*, 274 Ill. 380, 113 N. E. 696, 698, citing § 2422, vol. 5, ante.

³⁹ *O’Dea v. Cook*, 176 Cal. 659, 169 Pac. 366.

⁴⁰ *Head v. Jacobs*, 150 Ky. 290, 150 S. W. 349.

⁴¹ *Dickey v. Jackson*, 181 Ia. 1155, 165 N. W. 387.

⁴² Reckless discharge of revolver as justification for deprivation of part of salary by the imposition

making an arrest,⁴³ or for making an unlawful arrest,⁴⁴ or for making an arrest without a warrant.⁴⁵

§ 2425. Criminal responsibility.⁴⁶

of a fine. *People ex rel. v. Woods*, 163 N. Y. S. 178, 176 App. Div. 611.

Liability of police for shooting. *Haack v. Pollei*, 134 Minn. 78, 158 N. W. 908.

Liability for shooting, where policeman set up self-defense. *Forestal v. National Surety Co.*, 168 Ky. 552, 182 S. W. 614.

Liability for shooting by-stander by policeman in seeking to recapture an escaped prisoner. "If the shooting were done in a public place, where the officer understood or should have known people were in the habit of congregating or were likely to pass, the act might constitute such negligence as to render the officer civilly liable for any injury he might inflict upon an innocent person." *Askay v. Maloney*, 85 Or. 333, 166 Pac. 29, 31. See *Shaw v. Lord*, 41 Okl. 347, 137 Pac. 885, 50 L. R. A. (N. S.) 1069, Ann. Cas. 1916C, 1147.

In action to enjoin chief of police from making alleged unlawful arrests, held not personally liable for costs. *Seattle Taxicab & Transfer Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134.

A city marshal who makes a lawful arrest must use care to prevent oppression of his prisoner; he must not treat the prisoner inhumanly; and if the jail or calaboose is in such a condition—known to the officer—as to be an unfit place in which to confine a man

overnight without endangering his physical condition he must not put him there; a failure to use such due care and accord ordinarily decent treatment will constitute a breach of his bond. *Nixa v. McMullin*, 198 Mo. App. 1, 5, 6, 193 S. W. 596.

⁴³ *Mollnow v. Rafter*, 152 N. Y. S. 110, 89 Misc. Rep. 495.

In making arrest, police officer uses unnecessary force constituting an assault, held officer liable, not city. *Mollnow v. Rafter*, 152 N. Y. S. 110, 89 Misc. Rep. 495.

⁴⁴ *Mollnow v. Rafter*, 152 N. Y. S. 110, 89 Misc. Rep. 495.

Liability of policeman for wrongful arrest. *Waddle v. Wilson*, 164 Ky. 228, 175 S. W. 382.

Liability of sureties on bond of policemen for unlawful arrest, e. g., a minor suspected of being a delinquent child. *Weber v. Doust*, 81 Wash. 668, 143 Pac. 148.

Liability of village marshal for unlawfully arresting and beating a citizen on official bond declared where act was done as such marshal. *People v. Morgan*, 188 Ill. App. 250.

Liability of city marshal on his bond denied where one of his deputies illegally appointed made a wrongful arrest. *Commonwealth v. Boles*, 160 Ky. 775, 170 S. W. 170.

⁴⁵ *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391.

⁴⁶ Nonfeasance in office in failure to arrest certain persons.

§ 2426. Powers, rights and duties of police.⁴⁷

§ 2427. Same—right to enter premises without warrant.⁴⁸

§ 2428. Same—powers of police officer to arrest.⁴⁹

§ 2431. Liability of municipality for torts of policemen.⁵⁰

Pennewell v. State, 105 Ark. 32, 150 S. W. 114.

Made an offense for a police officer to buy and sell city warrants, punishable by disqualification from holding office. *State ex rel. v. Butte*, 54 Mont. 533, 172 Pac. 134.

Indictment of policemen for failure of duty. *Gaughan v. State (Ind.)*, 118 N. E. 565.

Police officer in conspiracy with other police officers and a gang of confidence operators, to protect the latter in their criminal activities. *MacPhee v. San Francisco Board of Police Comrs. (Cal. App.)*, 171 Pac. 1086.

⁴⁷ Duty to drill at stated time on order of superior. *People ex rel. v. Waldo*, 112 N. Y. S. 348, 106 N. E. 116.

⁴⁸ No right to enter private premises where policeman suspect gambling without a warrant. *People v. Brinker*, 140 N. Y. S. 448, 27 N. Y. Cr. E. 37.

⁴⁹ In an emergency an arrest without a warrant may be made. *Hobbs v. Washington*, 168 N. C. 293, 84 N. E. 391.

Police officer may arrest if reasonable grounds of suspicion appear, etc. *Kearney v. Laird*, 164 Mo. App. 406, 413, 144 S. W. 904.

May arrest without a warrant if officer had reasonable cause to suspect that a felony had been com-

mitted. *Usher v. Severance*, 86 Vt. 523, 86 Atl. 741.

May arrest one exceeding automobile speed limit. *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 Pac. 843, 845.

Officer may pursue and arrest one committing a breach of the peace in his presence without a warrant. *Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596.

City marshal can arrest without a warrant in the county in which the city is situated only for offenses committed in his presence. His power in this respect is no greater than that of a private citizen. *Holder v. St. Louis & San Francisco R. Co.*, 155 Mo. App. 664, 671, 135 S. W. 507.

⁵⁰ See § 2666, post.

Liability of city denied for policeman incarcerating one charged with violating a state law in an unsanitary lockup of the city. *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391.

City is not liable for damages due to its automobile patrol carrying a prisoner running into a vehicle on the street, since it was acting in its governmental capacity. *Stater v. Joplin*, 189 Mo. App. 383, 387, citing §§ 2431, 2432, vol. 5, ante.

“When the officer exceeds the use of necessary and reasonable force in making an arrest, or

§ 2431a. Liability on bonds of policemen.

The general rule is that where an officer while doing an act within the limits of his official authority exercises his powers improperly, or exceeds them or abuses his official discretion he becomes liable on his bond to the person injured. But if he acts without any process and without the authority of his office, in doing such act, he is not to be considered an officer but a personal trespasser. The liability of the sureties is restricted to the acts of their principal while engaged in the performance of some duty imposed upon him by law or for omission to perform some such duty. This rule applies to sureties on bonds of policemen.⁵¹

makes an unlawful arrest, he ceases to act in behalf of the city, and he assumes the entire responsibility himself. Victims of his rashness have no civil remedy, except against the individual, and have no right to look to the city for compensation." *Mollnow v. Rafter*, 152 N. Y. S. 110, 89 Misc. Rep. 495.

⁵¹ *Taylor v. Morgan*, 43 Okl. 142, 141 Pac. 679.

City marshal who fails to exercise ordinary care for his prisoners renders himself and his bondsmen liable. *Nixa v. McMullin*, 198 Mo. App. 1, 193 S. W. 596.

Action on bond for wrongful arrest, where facts showed that plaintiff was drunk and disorderly when arrested; the officer was justified in making the arrest without a warrant, and, held no liability. *Waddle v. Wilson*, 164 Ky. 228, 175 S. W. 382.

Action of bond of policeman who shot plaintiff; self defense pleaded. *Forestal v. National Surety Co.*, 168 Ky. 552, 182 S. W. 614.

Sureties of marshal liable where

he unlawfully arrests and beats one where the act is done in his official capacity by virtue of his office. *People v. Morgan*, 188 Ill. App. 250.

Action for alleged wrongful killing of prisoner. *Haack v. Pollei*, 134 Minn. 78, 158 N. W. 908.

Liability on bond of city marshal for assault, when no offense had been committed. *Riter v. Neatherly* (Tex. Civ. App.), 157 S. W. 439.

Policeman's unlawful arrest of a minor believed to be a delinquent child creates liability on his bond. *Weber v. Daust*, 81 Wash. 668, 143 Pac. 148.

Liability of sureties on police constable's bond to third persons for an unlawful assault by the officer. *Cairo v. Sheehan*, 173 Ill. App. 464.

Under law authorizing a city marshal to appoint policemen for one day, etc., held marshal not liable on his bond for wrongful act of a one-day policeman, since the statute did not provide that such policeman should serve under

§ 2432. Liability of municipality for torts of fire department.

A municipality cannot be held liable in damages either for a negligent use or failure to use its fire engines and equipment. It is not liable for acts of omission or commission, misfeasance or nonfeasance with reference thereto.⁵²

the bond of the marshal. *Commonwealth v. Boles*, 160 Ky. 775, 170 S. W. 170.

⁵² *Hawkins v. Springleld*, 194 Mo. App. 151, 155, 186 S. W. 576, citing § 2432, vol. 5, ante. and § 2695, vol. 6, ante. *Contra*, *Fowler v. Cleveland* (Ohio 1919), 126

N. E. 72, 79, quoting with approval from § 2432, vol. 5, ante, in dissenting opinion—a case holding a city liable for injury due to negligence of a driver of a fire motor truck in returning to its station.

See § 2643, post; § 2643, vol. 6, ante.

CHAPTER 46.

PUBLIC EDUCATION.

- | | |
|---|---|
| § 2433. Establishment and government of public schools. | § 2437. Powers of boards of education. |
| § 2434. Status of boards of education and school districts. | § 2439. Removal of commissioners —members of board. |
| § 2436. Election of members of board of education. | § 2440. Superintendent. |
| | § 2443. Removal of teacher. |
| | § 2444. Compensation of teachers. |

§ 2433. Establishment and government of public schools.

The common or free school system of education in this country has been organized, fostered and supported by constitutional provisions and legislative enactments as a primary and distinct function of the state and held under state control.¹

It is not a part of the local self-government inherent in the town, township or incorporated community, except insofar as the legislature may choose to make it such.²

¹ Louisville v. Board of Education, 154 Ky. 316, 157 S. W. 379.

District of Columbia. District of Columbia v. Tyrrell, 41 App. D. C. 463, 472.

In Minnesota. State ex rel. v. St. Paul, 128 Minn. 82, 150 N. W. 389, 391, et seq.

Under the constitution the state has absolute control, and may compel school districts to be provided for "in each township of the state." The constitution a mandate to the legislature, "prescribing as a duty the exercise of this inherent power." Associated

Schools, etc. v. School Dist., etc., 122 Minn. 254, 142 N. W. 325.

The object of the constitution is "to insure a regular method throughout the state, whereby all may be able to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic." Board of Education v. Moore, 17 Minn. 412, 416.

² It is not within the power of a city "to dissolve or alter in the essentials of its creation for educational purposes the corporate body known as the board of edu-

The general policy of the states has been to retain control of the common school system, to be administered under state laws by local agencies organized with plenary powers independent of local government with which by location and geographical boundaries the free schools are necessarily closely associated and to a greater or less extent authorized to cooperate.³

cation, or to relieve the city of its obligations in that connection by a change in the local form of government for the city through adoption of a new charter under the home rule law." *MacQueen v. Port Huron*, 194 Mich. 328, 160 N. W. 627, 630.

A freeholder's charter framed and adopted pursuant to constitutional provisions, being a law of the state, and having the same force and effect as a law directly enacted by the legislature, may provide compensation for members of the local board of education. And this is true notwithstanding the legislature has provided a general system of laws concerning the creation and conduct of the common schools of the state, but made no provision therein for compensation to school directors or trustees, and in no way limited or denied the right of a municipality to make such provision. *Stern v. Berkeley*, 25 Cal. App. 685, 145 Pac. 167, holding further that generally speaking the regulation of the matter was a "state affair," but that the member of the board was a municipal officer, and therefore the compensation to be paid him by the city out of the city treasury is purely a "municipal affair."

³In Michigan by the constitu-

tion the subject of common school and free education has been committed to the legislature. *Attorney-General v. Detroit Board of Education*, 154 Mich. 584, 118 N. W. 606; *Attorney-General v. Board of Education*, 99 Mich. 404, 58 N. W. 33.

"Fundamentally, provision for and control of our public school system is a state matter, delegated to and lodged in the state legislature by the constitution in a separate article entirely distinct from that relating to local government." *MacQueen v. Port Huron*, 194 Mich. 328, 160 N. W. 627, 629.

"Its administration, however, has been committed in its details to local agencies of limited territory, designated district boards or boards of education, co-operating with, and more or less closely allied to, municipal corporations for local government which exist in the form of cities, villages and townships covering the same territory; but the matter of universal and compulsory education and the support of free schools to that end, has been held apart from the organization and maintenance of cities and villages for strictly local government and municipal convenience." *Kuhn, Attorney-General v. Thompson*, 168 Mich. 511, 134 N. W. 722, 725.

Under a constitutional provision committing the entire subject-matter of free education to the legislature it is competent for the legislature to require something more than instruction in the common branches. Thus it has been held in Minnesota that instruction to boys in agriculture and to girls in housekeeping may be imposed, since this is simply a question of legislative policy and not of legislative power.⁴

In educational affairs the legislature may exercise compulsory authority. It may compel a school district to provide public school facilities, and if it fails to do so, another district may supply them, and the delinquent district may be compelled to pay tuition therefor.⁵

§ 2434. Status of boards of education and school districts.⁶

Authorities in control of the public or common schools, under whatever name, are mere auxiliaries or agencies

⁴ *Associated Schools v. School Dist.*, 122 Minn. 254, 142 N. W. 325.

⁵ The legislature may require the performance by its agents of such public functions "as fall within the general scope and objects of municipal organization." "The state has power to require of its municipal subdivisions the performance of duties of state concern and to demand that they raise money by taxation and disburse the same for such purpose." *Associated Schools, etc. v. School District, etc.*, 122 Minn. 254, 142 N. W. 325.

⁶ *Kuh, Attorney-General v. Thompson*, 168 Mich. 511, 134 N. W. 722.

Education is a state function and boards of are branches of state government. *Hirshfield v. Cook*, 175 N. Y. S. 809.

Board as part of state educational department, and, hence, is not subject to local control. *Hirshfield v. Cook*, 177 N. Y. S. 363.

Municipal charter may prescribe compensation of school director, since he is a municipal officer, although the school system may be a state affair. *Stern v. Berkeley*, 25 Cal. App. 685, 145 Pac. 167.

Board of aldermen of New York have the power, not the board of education, to fix remuneration of janitors. *Mahoney v. New York Board of Education*, 167 N. Y. S. 222, 179 App. Div. 782.

Library, free; when appointees and employees of are paid by city where library situated, they may be classified under civil service law applicable to city. *Trustees of Free Library v. Civil Service Com.*, 83 N. J. L. 196, 83 Atl. 980.

of the state for educational purposes only, created by the state as a means of exercising its political powers in an orderly and systematic manner, and as such are subject to the unrestricted control and direction of the legislature in matters of internal government.⁷

These school authorities are given power to acquire and hold property for educational purposes,⁸ and if they have been created bodies politic and corporate separate and distinct from the municipality or public corporation in the area in which they exercise their functions, they may sue and be sued.⁹

Laws authorize cities to maintain free libraries and reading rooms, upon adoption of the acts relating thereto. When law has been accepted and the library has been established, the action cannot be rescinded thereafter. *State ex rel. v. Bentley*, 96 Kan. 344, 150 Pac. 218.

⁷ *Associated Schools, etc. v. School District, etc.*, 122 Minn. 254, 142 N. W. 325.

Board of education in city, held agency of state for educational purposes only, although having power to acquire and hold property, to sue and be sued. *Daniels v. Grand Rapids Board of Education*, (Mich.), 158 N. W. 23.

In Michigan school boards are given large plenary powers and control of school matters practically independent of the local government of municipalities in which the schools are situated. *MacQueen v. Port Huron*, 194 Mich. 328, 160 N. W. 627, 629.

⁸ *Daniels v. Grand Rapids Board of Education*, 191 Mich. 339, 158 N. W. 23.

⁹ If the board of education is a

separate and distinct corporation from the municipality no relation of principal and agent exists between the two, and the city is not liable for the torts of the board. *Titusville Iron Co. v. New York*, 207 N. Y. 203, 208, 190 N. E. 806, reversing 128 N. Y. S. 1147, 144 App. Div. 893.

If the board of education is a distinct corporation the city may sue it for special assessments. *Wichita v. Board of Education*, 92 Kan. 967, 142 Pac. 946.

School district, held body corporate under statute. *Burton Machinery Co. v. Ruth*, 194 Mo. App. 194, 196, 186 S. W. 737.

Under a law providing that all control of property acquired for the purposes of the board of education vested in such board although title is in the city, and that suits in relation to such property shall be brought in the name of such board, and giving board power to lease property acquired for the purpose of furnishing school accommodations, suit for breach of lease and damages is

§ 2436. Election of members of board of education.¹⁰**§ 2437. Powers of boards of education.**

In the local community these school authorities are supreme in all matters directly, or by implication, involving the subject of education committed to them, but their power does not extend to matters of governmental police regulations of the territory in which they discharge their duties.¹¹

against board and not the city. *Rodemann v. New York*, 147 N. Y. S. 199, 162 App. Div. 150.

Board of education is sometimes department or co-ordinate branch of municipal government. *Taylor v. Greensboro* (N. C. 1918), 95 S. E. 771.

Public library board of Chicago, held under the statute, a part of the city government, relating to liability for tort. *Johnson v. Chicago*, 258 Ill. 494, 496, 101 N. E. 960, affirming 174 Ill. App. 414.

Status of board of education in **St. Paul, Minnesota**. *State ex rel. v. St. Paul*, 128 Minn. 82, 150 N. W. 389, 391, et seq.

Chicago School Board, prior to act April 20, 1917, was not a "body politic and corporate," but simply a department of the city government; now it is a body politic and corporate. *People ex rel. v. Davis*, 209 Ill. App. 117, 128; *Brenan v. People*, 176 Ill. 620.

District of Columbia. *Dist. of Col. v. Tyrrell*, 41 App. D. C. 463, 472.

¹⁰ One member elected from each city ward. *Searcy v. State* (Okla.), 167 Pac. 476.

¹¹ "The school authorities are supreme in all matters directly, or by implication, involving the sub-

ject of education, but with the matter of governmental police regulations, having to do solely with the maintenance of public order and peace, the health, safety and freedom from violence of the citizens of the state and the protection of property from destruction by violence, the school authorities have nothing to do. And it is well for them that they do not."

"On the other hand the law vests such authority over police matters in the city. (*R. S. Mo. 1909*, § 9764.) And such authority is given without restriction or exception. Within that sphere, the city has, so to speak, as exclusive authority as the school board has within the sphere of educational matters. Neither can interfere with the other in the exercise of the respective governmental functions confided to each. The work of education and everything necessary or impliedly necessary to the carrying on of the work is committed to the school board, and the city has no right to interfere with that work or direct how it shall be done; and the work of maintaining public order, establishing and enforcing police regulations which preserve the health

These authorities have full control over schools and school property. They must perform the obligations imposed upon them, and cannot surrender or abdicate, in whole or in part, any of the powers vested in them to the electors of the community; nor, will the courts assume to exercise any of such powers.¹²

In the more important urban centers, it is usual to permit or require the establishment and maintenance of high schools by boards of education.¹³

Express power is often conferred to provide instruction in matters of health and physical development, and such power has been held as authority to employ an optometrist, without at the same time adopting the entire plan of health supervision.¹⁴

The power of appointing and removing officers and employees of the board is to be ascertained from a reasonable construction of the local laws. If for example, the superintendent of schools is to be regarded as a mere employee, as distinguished from an officer, sometimes he may be removed by the board at its pleasure.¹⁵

In the absence of legal restriction a board being a legal entity, irrespective of change in its personnel, may in good faith contract to employ a superintendent of schools for services to be performed beyond the terms of the members of the board.¹⁶

A board of education cannot by rule restrict employment of teachers to such as are not members of certain

and safety of persons and property, is committed to the city, and the school board has no right to interfere with that work, nor is it or its employees exempt from such police regulations." *Kansas City v. Fee*, 174 Mo. App. 501, 504, 505, 160 S. W. 537, holding that a fireman in charge of a steam boiler of the school was subject to examination and license as provided by an ordinance of the city.

¹² *Molacek v. White*, 31 Okl. 693,

122 Pac. 523, 525, quoting with approval from § 382, vol. 1, ante.

¹³ Discretionary in cities of the first class. *Molacek v. White*, 31 Okl. 693, 122 Pac. 523, 525.

¹⁴ *Beard v. Webb* (Cal. App.), 169 Pac. 927.

¹⁵ *Farley v. Board of Education* (Okl.), 162 Pac. 797.

¹⁶ *Farley v. Board of Education* (Okl.), 162 Pac. 797.

See § 1254, ante.

organizations. Such rule clearly discriminates between certain classes and confers special privileges.¹⁷

§ 2439. Removal of commissioners—members of board.¹⁸

§ 2440. Superintendent.

A superintendent of schools who is not an officer but a mere employee may be removed at the pleasure of the board, if the law does not forbid.¹⁹

§ 2443. Removal of teacher.²⁰

§ 2444. Compensation of teachers.²¹

¹⁷ *People v. Chicago*, 199 Ill. App. 356.

¹⁸ *Mauch v. Kuhs* (Mo.), 191 S. W. 425.

Members of board of education, held officers of the city as to removal under Dallas, Tex., Charter. *Bonner v. Belsterling*, 104 Tex. 432, 138 S. W. 571, affirming (Tex. Civ. App.), 137 S. W. 1154.

Power of council to investigate the board of education under particular charter. *Miller v. Tayntor*, 155 N. Y. S. 746, 170 App. Div. 126.

Power of mayor to remove members of board of education. *Ib.*

¹⁹ *Farley v. Board of Education* (Okl.), 162 Pac. 797.

²⁰ *Grosjean v. San Francisco Board of Education* (Cal. App. 1919), 181 Pac. 113.

²¹ *Whittaker v. Salem*, 216 Mass. 483, 104 N. E. 359.

“Ratable” deduction on account of absence. *Glucksman v. New York Board of Education*, 165 N. Y. S. 351.

CHAPTER 47.

CHARITIES AND CORRECTION.

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| § 2447. Charities defined—origin—
classification. | § 2450. Duty of municipal corpora-
tions to support paupers. |
| § 2448. Municipal regulations of
charity. | § 2462. Juvenile courts. |

§ 2447. Charities defined—origin—classification.¹

§ 2448. Municipal regulations of charity.

Over public charities, that is, those supported in whole or in part by state or municipal funds, "manifestly the power of regulation and control is great, if not plenary." But municipal control of a private charitable association, order, or organization is not without its limitations. The municipal authorities can not say arbitrarily what person or what institution may or may not engage in charitable work dependent wholly or in part upon voluntary contributions from the public. Such would result in the use of the police power in an unreasonable and oppressive manner. Thus an ordinance creating a charities commission and conferring upon such body absolute and arbitrary power in granting or refusing permits, and to forbid any person from soliciting for charity, regardless of his personal character, worth or fitness, is unconstitutional and void.²

§ 2450. Duty of municipal corporation to support paupers.³

¹ "Private charity," one not supported in whole or in part by state or municipal funds. Ex parte Dart, 172 Cal. 47, 155 Pac. 63, 65.

² Ex parte Dart, 172 Cal. 47, 155 Pac. 63.

³ Statute abolishing almshouses

and establishing a system of pensioning, held void. State Board of Control v. Buckstegge (Ariz.), 158 Pac. 837.

Poor laws. Pryzbylowski v. Detroit Poor Comrs., 188 Mich. 270, 154 N. W. 117.

§ 2462. Juvenile courts.⁴

A court will not declare unconstitutional a legislative act creating a juvenile court if there is any reasonable theory upon which the act can be constitutionally upheld.⁵

In contests touching the custody of minors, the father is entitled to the custody unless it is made manifest that he is unfit or incompetent, or unless for some special or extraordinary reason, the welfare of the child demands a different disposition.⁶

The statute relating to "negligent and delinquent children" should be observed in proceedings in juvenile courts, and in Missouri, it has been held that when of a nature criminal the information should be based upon such statute, and the trial should be in accordance with "the practice and procedure prescribed by law for the conducting of criminal cases."⁷

⁴In Kentucky the legislature may authorize the establishment of juvenile courts. *Campbell County v. Newport*, 174 Ky. 712, 193 S. W. 1, L. R. A. 1917D, 791; *Commonwealth v. Yungblut*, 159 Ky. 87, 166 S. W. 808; *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733; *Marlowe v. Commonwealth*, 142 Ky. 106, 133 S. W. 1137.

Jurisdiction of juvenile courts, etc. *Weber v. Doust*, 81 Wash. 668, 143 Pac. 148.

Arresting a minor as a suspected delinquent without justification, renders officers liable on their official bonds. *Weber v. Doust*, 81 Wash. 668, 143 Pac. 148.

⁵*State ex rel. v. Kirby*, 260 Mo. 120, 127, 168 S. W. 746, approving *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508, and *State ex rel. v. Wilder*, 197 Mo. 1, 35, 94 S. W. 495.

⁶*State ex rel. v. Ellison*, 271 Mo. 416, 427, 428, 196 S. W. 1140, following *Re Searritt*, 76 Mo. 565, 582, and *Weir v. Marley*, 99 Mo. 484, 494.

⁷*State ex rel. v. Kirby*, 260 Mo. 120, 128, 129, 168 S. W. 746, approving *State ex rel. v. Tinch*, 258 Mo. 1, 166 S. W. 1028.

CHAPTER 48.

CLAIMS AGAINST MUNICIPAL CORPORATIONS.

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| § 2464. Valid claims against municipalities. | § 2471. When claims bear interest. |
| § 2465. Conditions precedent—presentation of claims. | § 2472. Allowance of claims. |
| § 2466. Same—notice of intention to sue. | § 2473. Same—effect of allowance or disallowance. |
| § 2467. Same—to whom claim to be presented. | § 2474. Auditing boards and officers. |
| § 2468. Same—time within which claims must be presented—delay. | § 2475. Review of decisions touching claims. |
| § 2469. Same—statement of claim. | § 2479. Power to compromise claims. |
| § 2470. Same—verification of claim. | § 2480. Who authorized to compromise. |

§ 2464. Valid claims against municipalities.¹

One who demands payment of a claim against a municipality must show some law authorizing it, or that it

¹ Expenses in holding a special primary election, constitute a claim against a municipality, under a law providing that "all expenses incurred by such board of election commissioners shall be paid by the city." *Johnson v. Winnebago County*, 256 Ill. 276, 100 N. E. 186, affirming 168 Ill. App. 293.

In a particular case it was held that the expenses of police commissioners connected with a hearing before the governor at the State Capitol wherein they were charged with official misconduct were not valid claims against the municipality and within the terms of a council resolution relating to expenses. "The only expenses

provided by law are those incurred in the performance of official duties—not those incurred by the commissioners in defending themselves against charges of official misconduct; and the vote of the city council has reference to expenses incurred by the city in prosecuting the charges—not those incurred in defending against them." Moreover, a New York case has declared that "when a citizen accepts a public office he assumes the burden of defending himself against unfounded acquisitions at his own expense, and that a legislative enactment purporting to authorize a city or town to defray such expenses is illegal and

arises from some contract, express or implied, which is sanctioned by law; it is not sufficient, if based on services rendered, that such services were beneficial.²

§ 2465. Conditions precedent—presentation of claims.³

The presentation of certain kinds of claims to a named municipal officer, board, or department,⁴ within the time designated,⁵ and in manner and form prescribed,⁶ is often made a condition precedent to the maintenance of an action therefor.⁷

void. *Chapman v. New York*, 168 N. Y. 80, 86, 61 N. E. 108, 56 L. R. A. 846, 85 Am. St. Rep. 661. But the court said it was unnecessary to go that far. *Gilbert v. Berlin*, 76 N. H. 470, 84 Atl. 235.

Liable for fees of stenographer for service to mayor and certain alderman at meetings pertaining to municipal affairs. *Griffen v. Chicago Heights*, 187 Ill. App. 468.

² *Michael v. Atoka* (Okl. 1919), 185 Pac. 96, following *Wichita County Comrs. v. Brett*, 32 Okl. 853, 124 Pac. 57.

³ **Submission to examination.** In claim for damages for the death of a child, law required claimant to submit to examination at a date to be fixed by the city comptroller, held failure of claimant in this respect precluded action thereon. *Tolchinsky v. New York*, 149 N. Y. S. 1016, 164 App. Div. 636.

Itemizing. *Vermeule v. Corning*, 174 N. Y. S. 220.

⁴ Section 2467, post.

⁵ Section 2468, post.

⁶ Sections 2469, 2470, post.

⁷ *Dahl v. Salt Lake City*, 45 Utah 544, 147 Pac. 622.

“This court has frequently held that this and similar statutes are mandatory, and that it is neces-

sary to file a claim with the city, either in actions *ex delicto* or *ex contractu*, before an action can be maintained thereon.” *Lenhart v. Hoquiam*, 86 Wash. 168, 149 Pac. 650; *Benson v. Seattle*, 78 Wash. 541, 139 Pac. 501; *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *International Contract Co. v. Seattle*, 69 Wash. 390, 125 Pac. 152; 74 Wash. 662, 134 Pac. 502; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840; *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58; *Lindblom v. Seattle*, 86 Wash. 305; 150 Pac. 422.

Service of a proper verified statement of the cause of action is a condition precedent to the maintenance thereof. *Ryan v. Schenectady*, 154 N. Y. S. 890, 91 Misc. Rep. 296.

Claims shall be itemized, verified and presented to the council for its audit and that no action shall be begun until after the expiration of a named time from its presentation. Compliance with this requirement is a condition precedent to the maintenance of an action on the claim, and it

Laws so requiring are uniformly sustained as constitutional and valid,⁸ and must be observed,⁹ unless the requirement has been waived.¹⁰

Whether the presentation of a given claim is necessary as a condition precedent to the right to maintain the action must be determined by a reasonable construction of the statutory or charter provision applicable.¹¹

Some laws cover all classes of action against the municipal corporation, but personal injury claims and claims

must be alleged and proved. *Vermeule v. Corning*, 166 N. Y. S. 546, following *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 792.

Notice of injury sustained as condition precedent to sue therefor. "This statute pertains to the remedy, and it is essential to the right to maintain an action to prove that the person injured or damaged gave notice to the town in compliance therewith." *Parker v. Pittsfield*, 88 Vt. 155, 92 Atl. 24, 26.

Failure to present precludes recovery of costs only, and does not bar suit. *Idabel v. Harrison*, 42 Okl. 469, 141 Pac. 1110; *Sallisaw v. Ritter*, 42 Okl. 626, 142 Pac. 391.

A particular statute requiring the presentation of claims was held a mere statute of nonclaim, and that if the action is brought within the time specified it is a sufficient presentation and compliance with the statute. *Athens v. Miller*, 190 Ala. 82, 66 So. 702, following *Anderson v. Birmingham*, 177 Ala. 302, 58 So. 256; *Perrine v. Southern Bitulithic Co.*, 190 Ala. 96, 66 So. 705.

⁸ *Haynes v. Seattle*, 83 Wash. 51, 145 Pac. 73; *Cole v. Seattle*, 64

Wash. 1, 116 Pac. 257, 34 L. R. A. (N. S.) 1166, Ann. Cas. 1913A, 344; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840.

Such laws are not arbitrary discrimination in favor of cities and towns, etc. *Frasch v. New Ulm*, 130 Minn. 41, 153 N. W. 121, L. R. A. 1915E, 749.

⁹ *Wagner v. Seattle*, 84 Wash. 275, 146 Pac. 621.

¹⁰ As to waiver. *Lindblom v. Seattle*, 86 Wash. 305, 150 Pac. 422.

Where city admits it cannot pay a warrant, presentation for payment is not required. *Alabama City G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91.

¹¹ *Abbott v. Spokane*, 75 Wash. 602, 135 Pac. 483; *International Contract Co. v. Seattle*, 69 Wash. 390, 125 Pac. 152.

Law did not require. *Commonwealth Water Co. v. Castleton*, 171 N. Y. S. 542; *Calabrese v. Chicago Heights*, 189 Ill. App. 534.

Injunction and damages as an incident, held statutes do not apply to. *Wall v. Salt Lake City*, 50 Utah 593, 168 Pac. 766; *Baumann v. New York*, 167 N. Y. S. 720, 180 App. Div. 498.

for damage or injury to property due to municipal negligence are more frequently included.¹²

And under some laws all damage claims whether sounding in tort or contract must be presented in the manner and within the time required.¹³

Particular kinds or classes of claims are not always embraced within the meaning of the applicable law, as action on contracts;¹⁴ breach of a street improvement contract;¹⁵ claim for balance for construction of a water-works system;¹⁶ or a public improvement under contract with a board of public works;¹⁷ salary of an officer, whether de jure or de facto, which the municipality had

¹² *Campbell v. Wichita Union Terminal Ry. Co.*, 101 Kan. 817, 168 Pac. 833; *Puckett & Wear v. Ft. Worth* (Tex. Civ. App.), 180 S. W. 1115.

Applies to damage to private property due to municipal negligence. *Diamond Iron Works v. Minneapolis*, 129 Minn. 267, 152 N. W. 647, distinguishing *Megins v. Duluth*, 97 Minn. 23, 106 N. W. 89, which construed a different statute, and commenting on other Minnesota cases.

Applies to claim for damages for illegal imprisonment under court sentence. *Marks v. Rome*, 145 Ga. 399, 89 S. E. 324.

Giving of notice of personal injuries, held mandatory, and condition precedent to right to bring suit. *McQuaid v. Warsaw*, 201 Ill. App. 136.

Damages for personal injuries due to defective street. "The giving of the statutory notice is a condition precedent to a right to recover." *Ft. Wayne v. Bender*, 57 Ind. App. 689, 105 N. E. 949.

Applies to actions in damages for injury to persons or property

from any defect in the condition of any bridge, street, alley or highway, but not applicable to injury resulting directly from the negligence of the agent of the city in failing to use due care in the manner in which he operated the bridge. The court has no disposition to extend the application of the statute by construction. *Michigan City v. Werner*, 186 Ind. 149, 114 N. E. 636.

¹³ *Willett v. Seattle*, 96 Wash. 632, 165 Pac. 876; *International Contract Co. v. Seattle*, 74 Wash. 662, 134 Pac. 502; *International Contract Co. v. Seattle*, 69 Wash. 391, 125 Pac. 152.

¹⁴ *Bradley v. Union*, 150 N. Y. S. 107, 164 App. Div. 565.

¹⁵ *Abbott v. Spokane*, 75 Wash. 602, 135 Pac. 483, distinguishing *International Contract Co. v. Seattle*, 69 Wash. 390, 125 Pac. 152, on ground of different charter provision.

¹⁶ *Forsyth v. Crellin*, 210 Fed. 835.

¹⁷ *Welles v. Portuguese-American Bank*, 211 Fed. 561 (C. C. A.), rehearing denied, 215 Fed. 81.

refused to pay;¹⁸ damages to goods due to municipal negligence, under a law relating only to claims for personal injuries and accounts;¹⁹ trespass to real property;²⁰ claim arising from change of a street grade, since it is neither a claim sounding in tort nor a contract claim.²¹

The phrase "claim for damages," was held not to include claims arising *ex delicto*, and especially claims arising from injuries occasioned by defects in a street, where the law expressly declares that the city shall not be liable for claims of such character. To present such a claim to the city council which it is prohibited from paying would be a vain and useless ceremony.²²

Under laws requiring the presentation of claims whether sounding in tort or contract, in street improvements the rule in Washington appears to be that where the property taken or damaged is contemplated by the plan of the work, and is a necessary incident to the making of the public improvement, no claim is necessary, because strictly speaking the property owner's action rests neither in tort nor contract. "In other words, where the taking or damaging is an indispensable and integral part of the improvement, necessarily anticipated by the plan and intended in the performance of

¹⁸ *State ex rel. v. Kelly*, 154 Wis. 482, 143 N. W. 153.

¹⁹ *Haley & Lang Co. v. Huron*, 36 S. D. 6, 153 N. W. 891.

²⁰ *Persons v. Valley City*, 26 N. D. 342, 144 N. W. 675.

²¹ *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Provident Trust Co. v. Spokane*, 75 Wash. 217, 134 Pac. 927.

Claim for damages and action on contract distinguished, also an action arising out of a breach of a contract distinguished, also an action arising out of a breach of a contract. *Williams v. Seattle*, 78 Wash. 15, 138 Pac. 300.

Law does not refer to damage claims; e. g., change of street grade. *Manson v. Chisholm* (Minn. 1919), 170 N. W. 924, citing § 2465, vol. 5, ante.

²² *Colby v. Portland*, 89 Or. 566, 174 Pac. 1159, approving *Caviness v. Vale*, 86 Or. 554, 558, 169 Pac. 95, 97, wherein it is said: "The authorities upon this subject are conflicting, and will be found collated in an exhaustive note in *Henry v. Lincoln*, 93 Neb. 331, 140 N. W. 664, as reported in 50 L. R. A. (N. S.) 173, and in *Miller v. Mullan*, 17 Idaho 28, 104 Pac. 660, 19 Ann. Cas. 1107.

the work, no claim is necessary, because the property owner is only recovering the compensation which he would have received had the city prior to making the improvement brought an action in condemnation for the purpose of having the damages for the taking or damaging determined."²³

But a claim for damages for flooding resulting from a street improvement is of a different character, since such item of damages was neither contemplated by the plan of the work, nor a necessary incident in making the street improvement. "Such damages were consequential or resultant, and therefore sound in tort, for which no action could be maintained unless a claim therefor had been filed as required."²⁴

The requirements under a particular law was held not applicable to a claim for damages due to the negligence of the city in operating its waterworks (a permissive enterprise which the city may engage in, or refrain from so doing), but applicable only to claims against the municipality for failure to discharge a duty imposed by statute, or arising out of the performance of its governmental functions or corporate duties.²⁵

Sometimes such laws are made applicable to both proprietary and governmental activities.²⁶

§ 2466. Same—notice of intention to sue.²⁷

²³ Willett v. Seattle, 96 Wash. 632, 165 Pac. 876; Jorjusun v. Seattle, 80 Wash. 126, 141 Pac. 334; Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504.

²⁴ Willett v. Seattle, 96 Wash. 632, 165 Pac. 876.

²⁵ Henry v. Lincoln, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. (N. S.) 174, reviewing many cases.

²⁶ Frasch v. New Ulm, 130 Minn. 41, 153 N. W. 121, L. R. A. 1915E, 749, distinguishing the Nebraska case cited in last note.

²⁷ Woentz v. New York, 168 N.

Y. S. 699, 101 Misc. Rep. 622; Halverson v. Williams, 38 S. D. 176, 160 N. W. 730; Weinstein v. New York, 141 N. Y. S. 372, 156 App. Div. 541; Lautman v. New York, 141 N. Y. S. 1042, 157 App. Div. 219.

Claim for salary, notice as condition precedent to sue need not be given. San Antonio v. Newman (Tex. Civ. App. 1918), 201 S. W. 191.

Demand must be presented to comptroller 30 days prior to action, and notice of intention to sue, etc.,

§ 2467. Same—to whom claim to be presented.²⁸

Laws require notice or statement of the nature of the claim to be given to or filed with a specified municipal officer or officers, as the city, town or village clerk,²⁹ and sometimes city attorney,³⁰ selectmen,³¹ city or town council,³² common council,³³ or governing body.³⁴

Service on the wrong officer or board, it has been held, is not notice to the municipality.³⁵

held not applicable to equitable action to enjoin operation of an elevated railroad, etc. *Flaxman v. New York*, 162 N. Y. S. 161, 98 Misc. Rep. 88.

Injunction to secure the abatement of the maintenance of a sewer system injurious to complainant's property, and damages incidental thereto, held under the particular circumstances could proceed without the presentation of a claim or notice of intention to sue. *Murecott v. New York*, 168 N. Y. S. 50, 181 App. Div. 171.

Notice of intention to commence the action to be served upon the corporation counsel. *Ryan v. Schenectady*, 154 N. Y. S. 890, 91 Misc. Rep. 296.

If it is clear that the legislature intended to establish a uniform rule which should apply to all municipalities of the state, thus avoiding the confusion arising out of the many dissimilar provisions contained in their various charters, a general statute on the subject will supercede a charter provision thereon, even of a home rule charter. *Johnson v. Duluth*, 133 Minn. 405, 158 N. W. 616.

Letters, held sufficient. *Sweeney v. New York*, 225 N. Y. 271, 122 N. E. 243.

²⁸ *Powers v. Boulder*, 54 Colo. 558, 131 Pac. 395.

²⁹ Statement in writing to be filed in office of city clerk; sufficiency of compliance. *Richmond v. Marseilles*, 190 Ill. App. 227, 232, following *Donaldson v. Dieterich*, 247 Ill. 522.

Filed with the village clerk. *Murphy v. Ft. Edwards*, 213 N. Y. 397, 107 N. E. 716.

³⁰ With city clerk and city attorney, if there is one. *McQuaid v. Warsaw*, 201 Ill. App. 136.

³¹ *Parker v. Pittsfield*, 88 Vt. 155, 92 Atl. 24.

³² *Persons v. Valley City*, 26 N. D. 342, 144 N. W. 675.

Presented to city or town council and filed with the city or town clerk. *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365.

³³ *Ryan v. Schenectady*, 154 N. Y. S. 890, 91 Misc. Rep. 296.

To mayor. *Hunt v. St. Louis* (Mo. 1919), 211 S. W. 673.

To mayor who directed the attention of the council to it, held sufficient. *Vermeule v. Corning*, 174 N. Y. S. 200.

³⁴ *Johnson v. Duluth*, 133 Minn. 405, 158 N. W. 616.

³⁵ Notice served on board of public works is not notice to the city. *Moran v. Salt Lake City* (Utah 1918), 173 Pac. 702.

§ 2468. Same—time within which claims must be presented—delay.³⁶

The usual provision is that the notice or claim, or a statement thereof, must be presented to or filed with a named municipal officer or body within a specified time from the accrual of the cause of action. In suits for personal injuries the cause of action accrues at the date of the injury.³⁷

In an action to recover damages to property caused by the removal of its lateral support, the cause of action does not accrue until the property has been actually invaded.³⁸

In New York the maxim that the law does not seek to compel a man to do that which he can not possibly perform has been made the basis for the principle that physical and mental inability to comply with a legal provision of the kind under consideration excuses the noncompliance. In that state, therefore, it is held that immature infancy which includes the age of five years, is as a matter of law, a condition of physical and mental inability excusing compliance with the requirement of filing a verified written statement within a time named. "It is reasonable to conclude that inability is attributable

³⁶ Thirty days. *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365.

Sixty days. *Barkley v. Highland Park* (Mich.), 165 N. W. 630; *Murphy v. Ft. Edwards*, 213 N. Y. 397, 107 N. E. 716.

Ninety days. *Birmingham v. Edwards* (Ala.), 77 So. 841; *Powers v. Boulder*, 54 Colo. 558, 131 Pac. 395.

Within three months after the happening of the injury or damages. *Ryan v. Schenectady*, 154 N. Y. S. 890, 91 Misc. Rep. 296.

Within four months. *King v. Parsons*, 95 Kan. 654, 149 Pac. 699.

Within one year after date of

accrual of last item. *Dahl v. Salt Lake City*, 45 Utah 544, 147 Pac. 622.

Within two years from the date of accrual, otherwise the claim would be barred; held applicable to a claim of a county against a municipality. *Montgomery County v. Montgomery*, 195 Ala. 197, 70 So. 642.

Waiver of time of presentation of claim for extra work. *Atlantic City v. Warren Bros. Co.*, 226 Fed. 372, 381, 141 C. C. A. 202.

³⁷ *Murphy v. Ft. Edwards*, 213 N. Y. 397, 107 N. E. 716.

³⁸ *Marks v. Seattle*, 88 Wash. 61, 152 Pac. 706.

to a first period of infancy and ability is attributable to a final period, as a matter of law, and through a period lying between those two the question of ability is a question of fact." The failure of the parent to file the statement for the infant was held not to preclude the action.³⁹

In some jurisdictions it seems that infants are not fully excepted from the operation of the legal requirements,⁴⁰ nor does other incapacity always excuse non-compliance.⁴¹

§ 2469. Same—statement of claim.⁴²

In claims for damages for injury to persons or property the usual requirement is that the notice or statement shall contain a brief general description of the time, place, cause and general nature of the injury,⁴³ and often

³⁹ *Murphy v. Ft. Edwards*, 213 N. Y. 397, 107 N. E. 716, affirming 144 N. Y. S. 451, 159 App. Div. 471; 143 N. Y. S. 378, 158 App. Div. 342.

⁴⁰ *People v. Valparaiso*, 178 Ind. 673, 100 N. E. 70; *Davidson v. Muskegon*, 111 Mich. 454, 69 N. W. 670; *Hoffmann v. Milwaukee El. R. & L. Co.*, 127 Wis. 76, 106 N. W. 808; *Morgan v. Des Moines*, 60 Fed. 208, 8 C. C. A. 569.

⁴¹ *Reid v. Kansas City*, 195 Mo. App. 457, 464, 192 S. W. 1047; *Haynes v. Seattle*, 83 Wash. 51, 145 Pac. 73.

Law required filing within 30 days and was not filed for 73 days, held barred and that incapacity did not excuse. *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365.

⁴² *Beard v. Kansas City*, 96 Kan. 102, 150 Pac. 540; *Powelson v. Seattle*, 87 Wash. 617, 152 Pac. 329; *Richardson v. Seattle*, 97 Wash. 521, 166 Pac. 1131.

See §§ 2718 to 2718d.

⁴³ *Ft. Wayne v. Bender*, 57 Ind. App. 689, 105 N. E. 949.

Verified statement of the nature of the claim and of the time and place at which such injury is alleged to have been received. *Murphy v. Ft. Edwards*, 213 N. Y. 397, 107 N. E. 716.

Written statement "giving the time and place of the happening of the accident or injury received and the circumstances relating thereto." *Campbell v. Wichita Union Terminal Ry. Co.*, 101 Kan. 817, 168 Pac. 833.

Statement containing time, place and circumstances of the injury, held sufficient. *King v. Parsons*, 95 Kan. 654, 149 Pac. 699.

Claim for damages "must accurately locate and describe the defect that caused the injury, accurately describe the injury * * * contain the items of damages claimed." *Willett v. Seattle*, 96 Wash. 632, 165 Pac. 876.

Under a law providing that

the amount of compensation or other relief demanded,⁴⁴ and sometimes the precise residence of claimant at the date of the filing and for a designated period prior thereto;⁴⁵ and occasionally we find the requirement that the names and addresses of claimant's witness shall be set out.⁴⁶

The requirement that the claim shall be itemized, of course, is not applicable to a claim which by its nature is incapable of itemization; but where the basis of the computation by which the aggregate amount of a claim was arrived at can be set out, it must be, to that extent, made specific, and not left as a mere demand for so much money.⁴⁷

damage claims shall "contain all items of damages claimed," a claim filed cannot be amended at the trial so as to include items of damages known at the time of the filing of the claim, but omitted therefrom. *Wagner v. Seattle*, 84 Wash. 275, 146 Pac. 621.

Claim to be in writing, verified by claimant's oath, containing a statement of place of residence of the claimant by street and number, if any, otherwise such facts as will disclose such place of residence with reasonable certainty, and describing the time when, the particular place where, and the circumstances under which the damages or injuries were sustained, the cause thereof, and so far as then practicable, the nature and extent thereof. *Ryan v. Schenectady*, 154 N. Y. S. 890, 91 Misc. Rep. 296.

⁴⁴ In damage suits a written notice, stating the time, place and circumstances thereof, and the amount of compensation or other relief demanded. No action shall be maintained unless such notice

has been given. *Johnson v. Duluth*, 133 Minn. 405, 158 N. W. 616.

Claim for unliquidated damages need not state any amount. *Comery v. White*, 40 R. I. 21, 99 Atl. 756, 760.

Amount of money demanded need not be stated. *Maryon v. Atlanta* (Ga. 1919), 99 S. E. 316.

⁴⁵ *Wagner v. Seattle*, 84 Wash. 275, 146 Pac. 621; *Titus v. Montezano* (Wash. 1919), 181 Pac. 43.

⁴⁶ Names and addresses of claimant's witnesses required. Held discretionary with trial court in the interest of justice to permit witnesses not named therein to testify, having due regard to the matter of surprise and opportunity of the city to rebut, etc. *Pearl v. Bay City*, 174 Mich. 643, 140 N. W. 938.

⁴⁷ *Vermeule v. Corning*, 166 N. Y. S. 546, 548.

In a claim for death due to alleged negligence of the city, etc., it was said: "The very nature of the claim in this case would prevent any itemization. The only

§ 2470. Same—verification of claim.⁴⁸**§ 2471. When claims bear interest.⁴⁹**

In the absence of legal provision therefor, the general rule is that a municipal corporation is not chargeable

liability claimed is the statutory one for wrongful death; the damages imposed therefor being in the nature of a penalty—'such damages as the jury may assess.' The law provides no mode, when the facts are known of ascertaining the exact amount of damages, except by the verdict of the jury." *Athens v. Miller*, 190 Ala. 82, 66 So. 702, 704.

Claim for unliquidated damages need not state any amount. *Comery v. White*, 40 R. I. 21, 99 Atl. 756, 760.

⁴⁸ Verification of claim required. *Wesley v. New York*, 154 N. Y. S. 461; *Ryan v. Schenectady*, 154 N. Y. S. 890, 91 Misc. Rep. 296; *Willet v. Seattle (Wash.)*, 165 Pac. 876.

Requirement as to verification is mandatory, and jurisdictional and failure precludes allowance. *Wilcox v. Porth*, 154 Wis. 422, 143 N. W. 165; *Reed v. Madison*, 162 Wis. 94, 155 N. W. 954.

The filing of a sworn claim for personal injuries within the time and with the officer named is a condition precedent to the right to maintain a suit therefor. *Birmingham v. Edwards (Ala.)*, 77 So. 841, 845.

Claim must be sworn to, of course, before one authorized to administer oaths, as a *de jure* or *de facto* officer. *Birmingham v. Edwards (Ala.)*, 77 So. 841.

Claims for salaries and amounts previously fixed and determined by law are excepted. *Reed v. Madison*, 162 Wis. 94, 155 N. W. 954.

Claim of an infant under ten years for injuries may be verified by his mother as his next friend where the minor is without a guardian. *Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664.

Unverified notice may be filed within the time named, and thereafter a verified claim may be filed, *Barkley v. Highland Park (Mich.)*, 165 N. W. 630, distinguishing *Griswold v. Ludington*, 116 Mich. 401, 74 N. W. 663.

⁴⁹ *Southern Pacific Co v. Santa Cruz*, 26 Cal. App. 26, 145 Pac. 736.

On deferred payments to a contractor, under contract to pay monthly. *Ryan v. New York*, 166 N. Y. S. 575, 179 App. Div. 181.

Interest denied on license taxes paid involuntarily. *Simmons Hdw. Co. v. St. Louis (Mo.)*, 192 S. W. 394.

Interest on deferred payments of paving contractor denied, in absence of a contract provision therefor. *Wilcox v. Porth*, 154 Wis. 422, 143 N. W. 165.

Denying interest of a claim for salary. *Lindsley v. Denver (Colo.)*, 172 Pac. 707.

Interest on claim for salary, where officer was wrongfully discharged. *La Chicotte v. New*

with interest on claims against it without express agreement therefor, the only exception being where money is wrongfully obtained and illegally withheld by it.⁵⁰

“It must be regarded as well settled that a claim against a municipality, although liquidated and due at a definite date, does not draw interest until demand has been made for its payment, unless it is otherwise agreed. This rule is independent of any statutory requirement.”⁵¹

§ 2472. Allowance of claims.

Claims must be allowed in the manner provided by law.⁵²

A law requiring verification of claims as a condition to allowance is mandatory, and the allowance of an unverified claim is without jurisdiction.⁵³

§ 2473. Same—effect of allowance or disallowance.

“Ordinarily the action of boards of supervisors and of common councils in auditing accounts and demands are deemed final and conclusive in the absence of fraud.”⁵⁴

York, 151 N. Y. S. 566, 166 App. Div. 279.

Interest on part of salary uncollected each month denied. *Smith v. Board of Education*, 208 N. Y. 84, 101 N. E. 791.

⁵⁰ *Merchants' Loan & Trust Co. v. Chicago*, 264 Ill. 76, 105 N. E. 726, 729, affirming 182 Ill. App. 298; *Mosiman Plumbing Co. v. Pocahontas*, 199 Ill. App. 211, 218.

⁵¹ The rule applies to a department of the municipality as the board of education. *Smith v. Board of Education*, 208 N. Y. 84, 101 N. E. 791, 134 N. Y. S. 1146, 150 App. Div. 898.

⁵² *State ex rel. v. Darner*, 95 Neb. 39, 144 N. W. 1048.

Signing of claim. *Old Forge Borough v. Foley Estate*, 67 Pa. Super. Ct. 125.

Approval by finance committee and allowance by city council, renders city liable though the mayor refused to sign the warrant. *Griffen v. Chicago Heights*, 187 Ill. App. 468.

⁵³ *Wilcox v. Porth*, 154 Wis. 422, 143 N. W. 165; *Reed v. Madison*, 162 Wis. 94, 155 N. W. 954.

⁵⁴ *People ex rel. v. Justice*, 147 N. Y. S. 257; *Weston v. Syracuse*, 158 N. Y. 287, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. Rep. 472; *Osterhoudt v. Rigney*, 98 N. Y. 222.

Thus the allowance of a statement of account by the legislative body showing a balance due for which a warrant was duly issued, constitutes a complete settlement as an account stated, and in the absence of fraud, cannot be rescinded by the municipality.⁵⁵

"In the absence of fraud, the official who is given the power to allow claims, when he has officially passed upon a claim, must be conclusively presumed to have had at the time full knowledge of all the facts pertaining thereto which a proper investigation would then have disclosed." Hence a city, it has been held, is precluded from recovering an overcharge erroneously allowed by the auditor and paid.⁵⁶

But a charter provision that "no money shall be paid out of the city treasury except upon warrant signed by the mayor for bills approved by the board of finance," it has been held, does not prevent the creditors of the city from resorting to actions against it.⁵⁷

§ 2474. Auditing boards and officers.⁵⁸

A requirement as to auditing claims relates to demands of money, claims capable of being audited. It has no reference to damage claims, e. g., change of street grade.⁵⁹

§ 2475. Review of decisions touching claims.⁶⁰

If a claim is not presented in manner and form as required, as a claim not verified, appeal from the action

⁵⁵ *Smith v. Anson* (Tex. Civ. App.), 160 S. W. 114, following *St. Louis Gas Co. v. St. Louis*, 84 Mo. 203.

⁵⁶ *Denver v. Republican Pub. Co.*, 60 Colo. 571, 155 Pac. 311.

⁵⁷ *Burton v. Rutland*, 87 Vt. 224, 8 Atl. 729.

⁵⁸ When auditing of claim required. *Smith Contracting Co. v. New York*, 131 N. Y. S. 479, 146 App. Div. 760.

Auditor, without approval by

legislative body, to audit claims for detective service employed by the prosecuting attorney. *Rocca v. Boyle*, 166 Cal. 94, 135 Pac. 34.

Stipulation as to postponing time of examination and investigation of claim by city officer. *Rapp v. New York*, 162 N. Y. S. 300, 176 App. Div. 155.

⁵⁹ *Manson v. Chisholm* (Minn. 1919), 170 N. W. 924, citing § 2465, vol. 5, ante.

⁶⁰ Appeal from the disallowance

of the council disregarding it to the court will be dismissed.⁶¹

Certiorari will lie to set aside an illegal approval of a bill containing fraudulent items and where the bill was not verified as required by law.⁶²

Where a board declined to authenticate the demand involved, and the council regarding the same as final refused to allow the claim, the determination of the board may be looked upon as final and that the liquidation of the matter can be accomplished only by suit.⁶³

A taxpayer may sue to recovery in behalf of the city, money wrongfully paid out by the mayor and a majority of the members of the city council on an unverified claim in violation of the charter.⁶⁴

§ 2479. Power to compromise claims.⁶⁵

A municipality has no power to compromise a claim which is not doubtful for less than the full amount due.⁶⁶

by the city council of a claim against a municipality, allowed. *American Cement Mach. Co. v. Madison*, 153 Wis. 444, 141 N. W. 246.

Appeal, time for taking. *Green Lake County v. Eau Claire*, 167 Wis. 304, 166 N. W. 656.

⁶¹ *Hutchinson v. Oshkosh*, 151 Wis. 573, 139 N. W. 446.

⁶² *Wahl v. Atlantic City Board*, etc., 84 N. J. L. 68, 85 Atl. 1024.

⁶³ *Boomshield v. Bay City*, 192 Mich. 488, 158 N. W. 1043.

⁶⁴ *Wilcox v. Porth*, 154 Wis. 422, 143 N. W. 165.

⁶⁵ *Re Christy*, 155 N. Y. S. 39, 92 Misc. Rep. 1.

Express power granted, and effected by ordinance. *Oakland v. Oakland Water Front Co.*, 162 Cal. 675, 124 Pac. 251.

Exists, to compromise judgments against municipality. *Port Town-*

send v. First National Bank, 241 Fed. 32, 154 C. C. A. 32.

Where a city's powers is defined and limited by its charter and statutes, it cannot substitute another remedy without an express grant of power to that effect. The rule was applied in denying power of a city to compromise a claim of a city workman injured under a particular city charter and a workmen's compensation act. *State ex rel. v. Carroll*, 94 Wash. 531, 162 Pac. 593.

Claim for damages resulting from appropriating real property for public way may be arbitrated by virtue of the California statute. *Cary v. Long* (Cal. 1919), 184 Pac. 857.

⁶⁶ "A municipal corporation holds its property in trust for public uses, and is bound to administer it faithfully, honestly and just-

A settlement for less than the amount due is an unlawful diversion of public money to private use.⁶⁷

As a municipality has no inherent or implied power to exempt from taxation,⁶⁸ it cannot compromise a claim or suit for taxes.⁶⁹

§ 2480. Who authorized to compromise.⁷⁰

ly. Its funds can be used only for corporate purposes. They cannot be diverted to private uses, nor can the municipal authorities or the electors give away the money or property of the municipality." *People v. Parker*, 231 Ill. 478, 83 N. E. 282, followed in *People v. Holton* (Ill. 1919), 122 N. E. 540, 543, stating: "The decision is well supported by authority and appears to be conclusive of the question here under consideration."

⁶⁷ *Ibid*.

⁶⁸ Sections 2063, 2400, ante.

⁶⁹ "A municipality cannot even compromise a tax suit. *Louisville v. Louisville Ry. Co.*, 111 Ky. 1, 63 S. W. 14, 23 Ky. Law Rep. 390, 98 Am. St. Rep. 387. In short, it has become recognized as a truism that what a municipality has no power to do, it has not done

merely because it tried to do it." *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122, 1125.

Road tax collected by city, one-half of which belong to the city, city's claim therefore cannot be compromised as by accepting payment of one year as a full settlement of all preceding years. *Albion v. Boone County*, 94 Neb. 494, 143 N. W. 749.

⁷⁰ Mayor and city council. *Port Townsend v. First National Bank*, 241 Fed. 32, 154 C. C. A. 32.

Council appropriated sum to pay wages of policemen who had been dismissed, when the matter of legality of dismissal was under consideration, held valid, as the matter constituted the settlement and payment of a doubtful claim. *Doverspike v. Magee*, 51 Pa. Super. Ct. 525.

CHAPTER 49.

ACTIONS BY AND AGAINST MUNICIPAL CORPORATIONS IN GENERAL.

- I. GENERAL CONSIDERATION.
- II. PARTICULAR ACTIONS.
- III. CRIMINAL LIABILITY.

I. GENERAL CONSIDERATION.

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| § 2486. Municipal corporation may sue and be sued. | § 2494. Parties. |
| § 2488. Liability on contracts. | § 2495. Pleadings. |
| § 2489. Limitation of actions. | § 2497. Representation by counsel—appearance. |
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II. PARTICULAR ACTIONS.

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III. CRIMINAL LIABILITY.

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| § 2519. In general. | § 2522. Liability for defective public ways. |
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I. GENERAL CONSIDERATION.

§ 2486. Municipal corporation may sue and be sued.¹

“The power to sue is one of the incidental rights of

¹ Bloomshfield v. Bay City, 192 Mich. 48, 158 N. W. 1043; Commonwealth Water Co. v. Castleton, 171 N. Y. S. 542; Coleman v. La

a corporation whether mentioned in the charter or not.”² This results from the power to enter into contracts.

Grande, 73 Or. 521, 144 Pac. 468; Dahl v. Salt Lake City, 45 Utah 544, 147 Pac. 622; State ex rel. v. De Mattos, 88 Wash. 35, 152 Pac. 721.

Assumpsit will lie against a municipal corporation for money had and received, where it uses funds derived by taxes to pay warrants for ordinary current expenses; this on the ground of equity and good conscience. Harrold v. East St. Louis, 197 Ill. App. 121, 131.

Injunction will lie by property owners to prevent a city from encroaching on their property and taking portions thereof in making street improvements, and to establish location of the streets and alleys involved. Wright v. Joplin, 190 Mo. App. 390, 392, 177 S. W. 314, holding action involves title to real estate.

In its private capacity, a municipal corporation “may sue and be sued, and is governed by the same laws and rules and subject to the same regulations and limitations that natural persons are, except so far as it may be exempt by express enactment.” People v. Chicago, 256 Ill. 558, 100 N. E. 194, 43 L. R. A. (N. S.) 954, Ann. Cas. 1913E, 305.

Where the board of education is a public corporation distinct from the municipality the latter may sue the former to recover special assessments against school property. Wichita v. Wichita Board of Education, 92 Kan. 967, 142 Pac. 946.

“Municipal corporations and board are responsible for what their agents do within the scope of their authority in their contracts with individuals or private corporations. If this were not true the authority of municipal and other corporations and boards to contract, and sue and be sued would amount to nothing.” Acme Lumber Co. v. Board of Comrs., 137 La. 899, 69 So. 739, 742.

“In the absence of a statute making them liable we have held that an action will not lie against a municipal corporation or local improvement district or the officers thereof because such corporation and their officers are merely agents of the state for governmental purposes.” Jones v. Sewer Improvement Dist., 119 Ark. 166, 177 S. W. 888.

² Board of Park Comrs. v. Nashville, 134 Tenn. 612, 185 S. W. 694, 700, applying rule to a board of park commissioners.

Ejectment against municipality. Russell & Johnson v. Oneonta (Ala.), 73 So. 986.

Liable in damages in like manner as private person or corporation. Roth v. St. Joseph, 180 Mo. App. 381, 167 S. W. 1155.

Municipal corporations are sometimes exempt from giving bond in appeals, etc., but this does not exempt them from conforming to the appeal law in other respects. McCarthy v. Chicago, 197 Ill. App. 564.

A municipality may sue to question the constitutionality of a statute changing its form of government.³

§ 2488. Liability on contracts.⁴

§ 2489. Limitation of actions.

Limitation statutes are usually made applicable to actions by and against municipal corporations.⁵

Ordinarily, all the consequences of notice, laches and lack of diligence apply to a municipal corporation with the same effect that those matters do to private corporations or individuals.⁶

³ "It would be an absurdity to hold that a corporation created by the legislature, with authority to prosecute and defend suit in the courts, cannot invoke the protection afforded by the constitution to prevent a violation of the rights granted to it." *Greta v. Bailey*, 141 La. 625, 75 So. 491, overruling *Carrollton v. Board of Metropolitan Police*, 21 La. Ann. 447, which held that a municipal corporation could not question the constitutionality of a statute transferring the control of the police of the city to a board.

⁴ *Philadelphia v. Welsbach Street Lighting Co.*, 218 Fed. 721, 134 C. C. A. 399; *Rapp v. New York*, 162 N. Y. S. 300, 176 App. Div. 155; *Macon v. Fidelity & Deposit Co.*, 194 Mo. App. 677, 189 S. W. 645.

Liable on contract, notwithstanding irregularity in method of approval. *Clarke v. Fall River*, 219 Mass. 580, 107 N. E. 419.

Liable on contract within its powers, where it accepts the work and material. *Wycoff v. Strong*, 26 Idaho 502, 144 Pac. 341.

No municipal liability, of course, on ultra vires acts and contracts,

and when sued thereon the municipality is not estopped from so pleading. *Foxen v. Santa Barbara*, 166 Cal. 77, 134 Pac. 1142.

Failure to observe requirements, as to letting, etc., and approval of council, in event of emergency, to protect the health of the community, e. g., hiring of a vessel as a quarantine station, does not exempt the municipality from liability thereon. *Detroit v. Grummond*, 216 Fed. (C. C. A.) 273, 279.

Action for money had and received will lie against a municipal corporation. *Cleveland National Bank v. Cleveland Board of Education* (Okl. 1919), 179 Pac. 464.

⁵ *Quackenbush v. Slayton*, 120 Minn. 373, 139 N. W. 716.

Law applicable, construction. *Schultz v. St. Paul*, 124 Minn. 257, 144 N. W. 955; *Sales v. Hartford*, 161 Wis. 136, 154 N. W. 853; *Bixby v. Sioux City* (Ia.), 164 N. W. 641; *New Orleans v. Penn Bridge Co.*, 241 Fed. 672, 154 C. C. A. 430; *Dockery v. Hamlet*, 162 N. C. 118, 78 S. E. 13.

Action to recover delinquent taxes. *Leake v. Dallas* (Tex. Civ. App.) 472.

⁶ *Salt Lake City v. Salt Lake*

§ 2490. Conditions precedent.

Statutes may prescribe conditions upon which suits may be brought and maintained against municipalities.⁷

Frequently, as mentioned elsewhere,⁸ laws require the presentations of certain kinds of claims in manner and form prescribed,⁹ within a time named,¹⁰ as a condition to the maintenance of action thereon;¹¹ and often notice of intention to sue is expressly specified as a condition precedent.¹²

This requirement under some laws is construed to mean that the petition or complaint must allege the presentation.¹³

However, the bringing of a suit is regarded under some laws as a sufficient presentation of the claim.¹⁴

Inv. Co., 43 Utah 181, 134 Pac. 603.

The delay of a city for two years to institute suit to recover money paid to a contractor on a fraudulent improvement contract, where it does not appear that the delay has in any way operated to the disadvantage of the defendant was held not to bar the claim, as such delay does not amount to laches. *Fond du Lac v. Barber Asphalt Paving Co.*, 156 Wis. 471, 146 N. W. 509.

⁷ *Dahl v. Salt Lake City*, 45 Utah 544, 147 Pac. 622.

⁸ Section 2465, ante.

⁹ Sections 2467, 2469, 2470, ante. *Birmingham v. Edwards* (Ala.), 77 So. 841; *Haberson v. Williams*, 38 S. D. 176, 160 N. W. 730; *Lenhart v. Hoquiam*, 86 Wash. 168, 149 Pac. 650; *Willett v. Seattle*, 96 Wash. 632, 165 Pac. 876; *Hutchinson v. Oshkosh*, 151 Wis. 573, 139 N. W. 446.

Presentation and disallowance.

Leggat v. Butte, 54 Mont. 137, 168 Pac. 38.

¹⁰ Section 2468, ante.

¹¹ Must allege and prove presentation of claim. *Stallings v. Tampa* (Fla. 1920), 83 So. 625.

Appropriate averment of such compliance is an indispensable part of the statement of the cause of action. *Berry v. Helena* (Mont. 1919), 182 Pac. 117, 118.

¹² Section 2466, ante.

¹³ *Woods v. Lincoln* (Neb. 1920), 177 N. W. 792.

"A complainant which fails to allege that the claim was presented to the city council and filed with the clerk within the time fixed by the charter does not state a cause of action." *Lindblom v. Seattle*, 86 Wash. 305, 150 Pac. 422; *Benson v. Seattle*, 78 Wash. 541, 139 Pac. 501; *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365.

¹⁴ *Perrine v. Southern Bitulithic Co.*, 190 Ala. 96, 66 So. 705; *Athens v. Miller*, 190 Ala. 82, 66 So. 702.

Moreover, under some laws, failure to make presentation is a matter of defense.¹⁵

A charter section providing that no suit of any nature whatever shall be instituted or maintained against the city unless the plaintiff therein shall aver and prove that previous to the filing of his original petition he applied to the city council for redress, satisfaction, compensation or relief, as the case may be, and that the same was by the city council refused, was held inapplicable to an injunction suit to prevent the wrongful diversion of public park property to other uses, as streets and sidewalks.¹⁶

§ 2491. Venue.¹⁷

§ 2493. Name in which action should be brought.¹⁸

The legislature may set aside the general rule and provide that all actions, on account of an act done or omitted by a municipal department, shall be brought

¹⁵ Keenan v. Mt. Pleasant, 176 Mich. 620, 142 N. W. 1114.

¹⁶ El Paso Union Passenger Depot Co. v. Look (Tex. Civ. App.), 201 S. W. 714; Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067, L. R. A. 1916D, 426 (sustaining injunction against discharging sewage and filth upon plaintiff's land in the absence of notice to the municipality).

In an injunction suit and damages as incidental thereto, presentation of claim, is not required, as such statutory requirement is inapplicable in such case. Wall v. Salt Lake City, 50 Utah 593, 168 Pac. 766; Bauman v. New York, 167 N. Y. S. 720, 18 App. Div. 498.

See § 2465, ante.

¹⁷ Whigham v. Gulf Refining Co., 20 Ga. App. 427, 93 S. E. 238.

Action against city only in county of its location. Piercy v.

Johnson City, 130 Tenn. 231, 169 S. W. 765 (considering cases).

In actions growing out of official misconduct of municipal officers within their territory against a municipality, statute construed to mean that suit must be instituted in the county of its situs. Cecil v. High Point, 165 N. C. 431, 81 S. E. 616, action to recover damages caused by reason of the city sewerage plant, operated in the city limits.

In the absence of a statute on the subject, the venue of a suit against a municipality extending into two counties is in the county where its officers and business is transacted. Arlington v. Calhoun, 148 Ga. 132, 95 S. E. 991 (reviewing decisions).

¹⁸ Mayfield v. College Park, 19 Ga. App. 823, 92 S. E. 289; Carpenter v. Wise, 155 N. Y. S. 996, 1000, 92 Misc. Rep. 246.

against that department and that no such action shall be brought against the municipality in its corporate name.¹⁹

§ 2494. Parties.²⁰

In actions relating to the collection and distribution of public taxes laws sometimes authorize state revenue

All suits by and against the city of New York "shall be in the corporate name of 'the city of New York.'" *Pounds v. Lee Ave., Theatre Co.*, 147 N. Y. S. 815, 84 Misc. Rep. 623.

It is sufficient to name the city against which suit is brought as "the city of _____" (naming it) without adding the name of the state, and "a municipal corporation," as the latter words, "are descriptive only and unnecessary." *Decatur v. Eady* (Ind. App.), 105 N. E. 590.

Filing a complaint in the nature of quo warranto by the state on the relation of named persons against a corporation *eo nomine* is not an admission by relators of the existence of the corporation, where the defendant is described, not as a corporation, but as a pretended corporation, and the persons claiming to be the officers are not described nor impleaded as such, but as individuals only. *State ex rel. v. Port of Bayocean*, 65 Or. 506, 133 Pac. 85.

Municipality may sue on the relation of a specified officer, that is, a back tax assessor. *Purcell v. Lexington* (Ky. 1919), 216 S. W. 599.

Unchartered municipal corporation by statute, may sue in its

own name. *Daly City v. Holbrook* (Cal. App. 1918), 178 Pac. 725.

¹⁹ *Henry v. Saratoga Springs*, 155 N. Y. S. 942, 944, 171 App. Div. 827.

Under a charter requiring the board of health to be sued in and by its proper name (designating it) and not in or by the name of the members of said board or any of them, a suit against such board, should be brought in such name. *People ex rel. v. Emerson*, 169 N. Y. S. 297.

²⁰ *Saunders v. Rainey*, 141 Ga. 77, 80 S. E. 305; *Cole v. Durham*, 176 N. C. 289, 97 S. E. 33.

When a municipality is not a necessary party in a suit to enjoy the obstruction of an alley. *Bowers v. Machir* (Tex. Civ. App.), 758.

Where parties necessary are not made parties. *Ex parte Whaley*, 188 Ala. 381, 66 So. 145; *Birmingham v. Muller* (Ala.), 73 So. 30.

Additional parties under a statute providing that when a controversy cannot be determined without the presence of other parties. *Kaplan v. Omaha*, 100 Neb. 567, 160 N. W. 960.

Under authority to bring in a new party, a city may be brought in as party defendant where it is necessary to a complete determination of the litigation. *Hunter v.*

agents or other similar state officers to sue counties for the use of municipalities.²¹

In an action of three rival claimants to oust three others from offices as aldermen, the municipality is not a proper party plaintiff.²²

In a suit by a taxpayer to restrain the enforcement of an ordinance to purchase real estate all parties to the contract are necessary parties.²³

In an injunction suit to restrain an election law from taking effect in a municipality the state officers whose duty is to have charge of such election are the proper parties defendant.²⁴

In an action against a municipality due to negligence in operating an electric light plant it is not necessary to make the officers agents or servants in charge of such plant parties defendant.²⁵

Where it is sought to enjoin a municipality from enter-

Clark & Henery Const. Co., 69 Or. 34, 137 Pac. 743.

The petition of a citizen to be made a party plaintiff to a suit by a city for an infraction of its rights as a corporate entity by petition containing all the causes of action and seeking all the relief which the citizen alleged or sought, should be rejected. *Princeton v. Princeton El. & P. Co.*, 166 Ky. 730, 179 S. W. 1074.

Under the charter of Greater New York providing that all suits by or against the city of New York shall be in the corporate name of "the city of New York," a suit to remove an encroachment cannot be instituted by a borough president. *Pounds v. Lee Ave. Theater Co.*, 147 N. Y. S. 815, 84 Misc. Rep. 623.

In partition "if a municipal corporation is made a party defendant, except in a case where it is

the purpose of the defendant in good faith to ascertain the amount of a lien or interest which cannot be determined by a mere computation or to litigate a bona fide claim that such lien or interest is invalid, the court should by its judgment and in its award of costs in the action take into consideration the fact that such municipality was not a necessary party to the action." *Delcambre v. Delcambre*, 210 N. Y. 460, 104 N. E. 950, 952.

²¹ *Robertson v. Monroe County*, 118 Miss. 520, 541, 79 So. 187.

²² *Summer v. Henderson*, 116 Miss. 64, 76 So. 829.

²³ *Dunham v. Slidell*, 133 La. 212, 62 So. 635.

²⁴ *Gretna v. Bailey*, 141 La. 625, 75 So. 491.

²⁵ *Athens v. Miller*, 190 Ala. 82, 66 So. 702.

ing into a contract, the members of the council who adopted the resolution authorizing the contract, should not be made parties defendant, because their action, whether right or wrong, is completed, and an injunction against them would avail nothing.²⁶

In an action to enforce claims of materialmen against a fund held by the city the proper procedure is for one of the materialmen to bring a bill in behalf of himself and all the others, and not for him to bring a bill in his own behalf making the other materialmen parties defendant.²⁷

In an action to annul an order of the legislative body declaring that by a certain referendum election an ordinance previously sought to be passed by the legislative body had been rejected by the electors of the municipality, a railroad company interested in the suit, as it related to its franchise, is not a necessary party, since a decree or judgment could not in any way conclude its rights.²⁸

In a suit by a city on the official bond of its comptroller who embezzled bonds deposited with him by contractors to guarantee work done and materials furnished by them in doing public work, the contractors may be joined as plaintiffs with the city.²⁹

Statutes provide that in damage suits against a city for an act or acts arising out of the negligence of another, such other person or corporation upon notice to plaintiff, must be made a party with the city.³⁰

Thus in suits for wrongs or injuries for which municipalities are only liable for culpable neglect to remedy

²⁶ Gibbs v. Luther, 143 N. Y. S. 90, 81 Misc. Rep. 611.

²⁷ Hunter v. Boston, 218 Mass. 535, 106 N. E. 145, 147.

²⁸ Reed v. Wing, 168 Cal. 706, 144 Pac. 964.

²⁹ National Surety Co. v. Louisville, 165 Ky. 38, 176 S. W. 364.

³⁰ Hutchinson v. Mullins, 189 Mo. App. 438, 176 S. W. 1083.

Action for negligently maintaining a bill board on a sidewalk. Erector of, is a party. If city goes to trial without objection because such person is not made a party, held waived. Vandevere v. Kansas City, 187 Mo. App. 297, 173 S. W. 696.

a condition negligently created or made or allowed to exist by a person or corporation not related in service to the municipality—a stranger to the municipal service or function—such person or corporation shall be joined as a defendant.³¹

So in actions against a municipality for injuries resulting from defective public ways due to the negligence of contractors, statutes provide that such contractors should be made parties, but in the absence of evidence tending to show that the act of a contractor caused the defect he need not be made a party.³²

In an action for damages against a municipality for suffering a nuisance due to a railroad company erecting an embankment, it is not necessary to make the railroad company a party.³³

§ 2495. Pleadings.³⁴

Where specified conditions precedent are required, as the presentation and disallowance of a claim sued on such presentation and disallowance must appear on the face of the petition.³⁵

And where notice as a condition to sue is prescribed the petition or complaint must show affirmatively that the notice required by law was served upon the municipal corporation within the time named.³⁶

³¹ *Birmingham v. Carle*, 191 Ala. 539, 68 So. 22, L. R. A. 1915F, 797; *Birmingham v. Muller* (Ala.), 73 So. 30; *Benton v. Montgomery* (Ala.), 75 So. 473.

³² *Brown v. St. Joseph*, 184 Mo. App. 667, 171 S. W. 935.

³³ *Roth v. St. Joseph*, 180 Mo. App. 381, 167 S. W. 1155.

³⁴ *Averment as to class of city*. *Lenhart v. Hoquiam*, 86 Wash. 168, 149 Pac. 650.

Plea of another action pending. *Murray v. Butte*, 51 Mont. 258, 151 Pac. 1051.

Petition of a city to recover an alleged overcharge for publishing city notices paid by the city. *Denver v. Republican Pub. Co.*, 60 Colo. 571, 155 Pac. 311.

Declaration in trespass for tearing down building by virtue of ordinance authorizing tearing down dangerous buildings. *Goldstein v. Chicago*, 172 Ill. App. 415.

³⁵ *Leggat v. Butte*, 54 Mont. 137, 168 Pac. 38; *Lenhart v. Hoquiam*, 86 Wash. 168, 149 Pac. 650.

³⁶ *Edmunds v. Chicago*, 203 Ill. App. 327; *Stallings v. Tampa* (Fla.

However, whether the requirement as to presentation of claim or the service of notice should be pleaded by the plaintiff, or whether failure in this respect is a matter of defense, depends upon the proper construction of the law applicable.³⁷

Thus where the law does not provide that omission to present any claim shall be a bar to an action against the municipality therefor, but merely prescribes that it shall be "a sufficient defense in any court," the plaintiff need not allege and prove presentation.³⁸

Other restrictions or conditions to the maintenance of actions against municipalities are often exacted, as the allegation, in a suit on a claim that the city or town has "not settled or adjusted or offered to settle or adjust the said claim."³⁹

And in actions involving debts, under many laws the averment is necessary that the municipality had the authority to incur such indebtedness, e. g., in a suit against a city to enforce specific performance of a contract to purchase a waterworks system.⁴⁰

Sometimes it is necessary to aver that the debt was contracted either by ordinance or resolution of the legislative body, as required by law, and that at the time of the contract provision was made for the collection of a sufficient sum to pay the annual interest thereon and the principal when due. However, in a suit against a municipality to recover damages for conversion of certain property delivered to it under a contract of sale, it is held that such allegation is not essential, since the action is not to collect a debt.⁴¹

Under particular laws it is necessary to allege facts showing the contract sued on was within the scope of

1920), 83 So. 625; *Berry v. Helena* (Mont. 1919), 182 Pac. 117; *Woods v. Lincoln* (Neb. 1920), 177 N. W. 792.

³⁷ *Gellenbeck v. Mobridge*, 40 S. D. 157, 166 N. W. 631.

³⁸ *Keenan v. Mt. Pleasant*, 176 Mich. 620, 142 N. W. 1114.

³⁹ *Sweeting v. Staten Island Midland Ry. Co.*, 162 N. Y. S. 961, 176 App. Div. 494.

⁴⁰ *Ashland Waterworks Co. v. Ashland*, 230 Fed. 254.

⁴¹ *Teague v. Fabric Fire Hose Co.* (Tex. Civ. App.), 177 S. W. 160.

the powers of the municipal corporation, was expressly authorized by law, was made upon a consideration wholly to be performed in the future, and was evidenced by a writing dated when made and signed by duly authorized parties. But whether such restrictions should be set out in the petition or whether they are matters of defense is to be determined by the intent of the applicable law. Thus in a suit by a municipal corporation against a bank on a certified check, such averments, it has been held, are not required.⁴²

In actions for damages against the municipality due to a defective public way, of course, the necessary elements to constitute a cause of action, or defenses available must be pleaded in accordance with the established rules in the particular jurisdiction. Charges of negligence against a municipal corporation and its officers, agents and servants, are to be made in like manner as charges of disregard of legal obligation against individuals and private corporations. However, in pleading negligence against a municipality, knowledge of the defect, whether actual or constructive, on its part, should be kept in view, since such knowledge is essential to establish municipal liability.⁴³

⁴² The court reasoned that here action is based upon a certified check which under the negotiable instruments act, is equivalent to an accepted inland bill of exchange and makes the acceptor, the defendant bank, the principal if not the sole debtor. This check, therefore, imports a prima facie consideration in plaintiff's favor, and the defendant is primarily and not secondarily liable thereon. The city may have rightfully come into possession of the check in a manner in no way involving a contract subject to the restrictions imposed by the statute. The provisions of the statute are intended for the pro-

tection of municipal corporations against their own obligations, and not for the protection of those who become obligated to such city. *Weston v. Bank of Greene County* (Mo. App.), 192 S. W. 126, 127, quoting with approval part of § 1276, p. 2775, vol. 3, ante.

⁴³ *Clancy v. Joplin* (Mo. App.), 181 S. W. 120. See § 2724, post.

Petition for injuries due to defective street need not allege that the street was a public thoroughfare within the municipal area which it was the duty of the city to maintain safely, etc. *Bickel Asphalt Pav. Co. v. Yaeger*, 176 Ky. 712, 197 S. W. 417.

The general rule as to the required allegations has been stated clearly in a late Florida case: "In an action against a municipal corporation for negligent injuries, the gist of the action is the negligence for which the corporation is liable; and it is essential to allege in the declaration ultimate facts showing the relation out of

Allegation that city was constructively charged with knowledge of defect. *Brown v. Milledgeville*, 20 Ga. App. 392, 93 S. E. 25.

Where notice to the city or presentation of the claim is made a condition precedent to the institution of the suit, such facts must be alleged sufficiently. *Indianapolis v. Slider*, 56 Ind. App. 230, 105 N. E. 56; *Hall v. Spokane*, 79 Wash. 303, 140 Pac. 348.

Place of injury, held not element of cause of action. *Carlin v. Chicago*, 262 Ill. 564, 104 N. E. 905, reversing 177 Ill. App. 89.

Injury due to ice and snow. *Griffin v. Marion*, 163 Ia. 435, 144 N. W. 1011; *Cowgill v. St. Joseph*, 180 Mo. App. 327, 167 S. W. 1157.

Injury due to temporary sidewalk in repairing. *Brentlinger v. Louisville Ry. Co.*, 156 Ky. 685, 161 S. W. 1107.

Variance. *Price v. Maryville*, 174 Mo. App. 698, 161 S. W. 295; *Lynch v. Winton Borough*, 54 Pa. Super. Ct. 93.

Allegation where defect was a hole in the street. *Indianapolis v. Stokes*, 182 Ind. 31, 105 N. E. 477; *East Chicago v. Gilbert*, 59 Ind. App. 613, 108 N. E. 29.

Action for damages for personal injury due to piece of sewer pipe left on a sidewalk due to the negligence of another. *Hutchinson v. Mullins*, 189 Mo. App. 43, 176 S. W. 1083.

If the injury resulted to the pedestrian suing by a defective board in a sidewalk over a coal hole giving way, an allegation that "the covering of said hole had become decayed and loose," is broad enough to admit proof of either one of the defective conditions alleged. *Bond v. Sedalia* (Mo. App.), 194 S. W. 740.

In an action against a municipality due to negligence in operating a light plant it is not necessary to name any particular person, or servant or agent or officer of the municipal corporation as the one guilty of the negligence complained of. *Athens v. Miller*, 190 Ala. 82, 66 So. 702, 704.

Special defenses by the city must be pleaded. *Ironton v. Harrison Const. Co.*, 212 Fed. 353.

Pleading ultra vires as a defense. *Foxen v. Santa Barbara*, 166 Cal. 77, 134 Pac. 1142.

Striking foot against brick or stone imbedded at street crossing, petition held insufficient. *Pomes v. McComb City* (Miss. 1919), 83 So. 636.

It is not sufficient for a petition, complaint of declaration to aver that a particular duty rested upon a municipality, but it must state the facts from which the law will raise that duty. *Holt v. Moline*, 196 Ill. App. 235, 237.

which arose the duty of the corporation to exercise appropriate care with reference to the rights of the plaintiff, and also the negligent act of omission or commission for which the corporation is responsible, that proximately caused the injury complained of, the specific ultimate fact that actually caused the injury being duly alleged so that a definite issue may be presented for trial.”⁴⁴

§ 2497. Representation by counsel—appearance.

Voluntary appearance in court by a city attorney by express authority of the council gives the court jurisdiction of the municipality. When the council authorizes such voluntary appearance the city is bound thereby precisely as any other party against whom suit has been brought. “It is the duty of the city attorney to represent the city in litigation pending in court, and his appearance for it in instituting suit or in its behalf when sued, in the absence of any showing to the contrary, is presumed to have been authorized.”⁴⁵

Municipal corporations are bound by the acts of their attorneys in like manner as private corporations and individuals, and in the absence of fraud or collusion on their part, the general rule is that attorneys have power to bind their clients including municipal corporations, by consenting to judgments or decrees.⁴⁶

Litigation in which the municipality is interested is within the exclusive control of the authorities set up to direct and manage its affairs, and these authorities are empowered to instruct the legal representative as to such litigation, which instruction he cannot disregard.⁴⁷

⁴⁴ *Gonzalez v. Pensacola*, 65 Fla. 241, 61 So. 503, 505.

⁴⁵ *Rankin v. Chariton*, 160 Ia. 265, 139 N. W. 560, 563.

⁴⁶ *Salt Lake City v. Salt Lake Inv. Co.*, 43 Utah 181, 134 Pac. 603, 607.

The general rule that a party to an action is bound by the stipulations and agreements entered into

by his counsel in open court as a part of the proceedings of the cause, and the acts and doings of the attorney are the acts and doings of the client, has been applied to municipalities. *Richardson v. Seattle*, 97 Wash. 371, 166 Pac. 639, 642.

⁴⁷ By resolution the city council directed the city solicitor to dis-

§ 2498. Defenses.⁴⁸**§ 2499. Judgment.⁴⁹****§ 2500. Enforcement of judgment.⁵⁰**

The general rule is that an execution cannot issue on

continue a certain suit and instructed the mayor to arrange for its dismissal and an entry of judgment for the defendants, and upon request the court disposed of the litigation accordingly, and the city solicitor excepted. "The city solicitor has no standing in this case for he is not acting for the city but in defiance of its wishes; that is, he is here, not for the purpose of doing what the city instructed him to do, but to prevent the city from doing it." *Portsmouth v. New Hampshire Nat. Bank*, 76 N. H. 577, 83 Atl. 459.

⁴⁸ That contract had been executed without authority is not a sufficient defense; it is necessary also that its execution had not been ratified. "Though unauthorized it was binding if ratified." *Detroit v. Grummond*, 216 Fed. (C. C. A.), 273, 275.

Presentation of claim, etc., held a matter of defense. The fact that a claim has never been presented for allowance is made by some laws a matter of defense, or "a sufficient defense in any court." *Keenan v. Mt. Pleasant*, 176 Mich. 620, 142 N. W. 1114.

In damage suit against a municipality for injuries due to the falling of a banner which had been stretched across a principal street by third persons, the application of the doctrine of *res ipsa loquitur* was denied. *Du Bois Borough v.*

Pancoast, 218 Fed. 60, 63, 133 C. C. A. 662.

⁴⁹ *Kilroy v. St. Louis*, 242 Mo. 79, 145 S. W. 769.

Under statutory authority consent by a municipality to permit a party litigant to have a final judgment against it quieting the title to the lands in controversy, without reservation as to streets, such consent judgment becomes res adjudicata between the parties, and the city cannot afterwards claim the existence of public ways as to such lands. *Oakland v. Oakland Water Front Co.*, 162 Cal. 675, 124 Pac. 251.

⁵⁰ *Rodee v. Ogdensburg*, 148 N. Y. S. 826, 835, 86 Misc. Rep. 229.

Judgment ambiguous, construction. *Rodee v. Ogdensburg*, 148 N. Y. S. 826, 86 Misc. Rep. 229.

Enforced by mandamus. *Whigham v. Gulf Refining Co.*, 20 Ga. App. 427, 93 S. E. 238.

Enforcement of a vendor's lien against a municipality. *Ft. Worth v. Reynolds* (Tex. Civ. App.), 190 S. W. 501.

Method of enforcing against municipalities prescribed by general statute cannot be abridged or limited by city charter. *Symons v. United States* (C. C. A.), 252 Fed. 109; *West Linn v. Tufts*, 75 Or. 304, 146 Pac. 986; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777.

Statutes prescribe a procedure by which moneys or credits of a judg-

a judgment against a municipal corporation.⁵¹

It is sometimes said, however, that "in the absence of a statute expressly prohibiting it execution may run against a municipality, but no levy can be made upon property owned and held by the city for public purposes."⁵²

Independent of a statute exempting municipal property from sale on execution a lien, it has been held, cannot be enforced upon property used for municipal purposes.⁵³

While ordinarily mandamus will lie to compel the proper municipal authorities to levy and assess taxes for the payment of a judgment against the city, the extent of this power to tax is limited by the provisions of the constitution and statutes, and only the surplus of the revenues over and above the amount necessary for the operation and conduct of the city government can be applied to this purpose.⁵⁴

ment debtor in the hands of a municipal corporation may be obtained in satisfaction of a judgment, as by directing the payment into court of the amount required to satisfy the judgment, "if sufficient there be." The latter words have been construed as not intended to restrict or limit payment of those cases only where the sum due from the city to the judgment debtor was sufficient to liquidate the judgment, but rather intended, where the amount due exceeded the judgment, to limit the amount paid into court to a sum sufficient only to cancel the judgment. *Gise v. Myers*, 22 Cal. App. 127, 133 Pac. 500.

⁵¹ Section 1160, ante; § 1160, vol. 3, ante.

It is error to award execution

on a judgment against a municipal corporation. *Howell v. Gillespie*, 202 Ill. App. 447; *Laredò v. Frishmuth* (Tex. Civ. App.), 196 S. W. 190, 195.

An execution cannot issue on a judgment against a municipal corporation. "The law provides other methods for collecting the same, and it is not to be presumed that a municipal corporation will attempt to repudiate its legal liability when finally adjudicated." *Waterman-Waterbury Co. v. School District*, 183 Mich. 168, 150 N. W. 104, 106.

⁵² *Clarendon v. Betts* (Tex. Civ. App.), 174 S. W. 958.

⁵³ *Russell & Johnson v. Oneonta* (Ala.), 73 So. 986.

⁵⁴ *Clarendon v. Betts* (Tex. Civ. App.), 174 S. W. 958.

§ 2501. Costs.⁵⁵

II. PARTICULAR ACTIONS.

§ 2502. Equitable remedies—injunction in general.

Public officers and municipalities may be restrained by injunction when they are acting illegally or without authority and in breach of the public trust committed to them and thereby causing irreparable injury.⁵⁶

⁵⁵ In the absence of provision therefor, cost may be allowed or not; and if allowed, may be apportioned between the parties in the discretion of the court. *Brown v. Anacortes*, 79 Wash. 33, 139 Pac. 652, 654.

Municipality, held not liable for costs in suit brought by the state, which resulted in benefit to city. *Forman v. Sewerage & Water Board*, 135 La. 1031, 66 So. 351.

In an action against a police judge to enjoin the enforcement of an ordinance, the municipality not being a party to the proceedings no judgment for costs can be rendered against it. *Chesapeake & O. Ry. Co. v. Harmon*, 159 Ky. 59, 166 S. W. 786.

Unless a claim is presented in writing as required under some laws no judgment can properly be rendered against the city for costs. *Beard v. Kansas City*, 96 Kan. 102, 150 Pac. 540; *Ft. Scott v. Elliott*, 68 Kan. 805, 74 Pac. 609; *White v. Bonner Springs* 99 Kan. 148, 160 Pac. 1024.

Not applicable to suits brought in a justice court, nor in case of appeals from such courts. *Bradley v. Union*, 150 N. Y. S. 112, 164 App. Div. 735.

Laws provide that no costs shall

be recovered against a municipality in any action brought against it for any unliquidated claim which has not been presented to the city council to be audited, nor upon any claim allowed in part unless the recovery shall be for a greater sum than the amount allowed with the interest due. *Hugo v. Nance*, 39 Okl. 640, 135 Pac. 346.

Above provision has no application to incorporated town. *Belle-vue Gas & Oil Co. v. Carr* (Okl.), 161 Pac. 203.

⁵⁶ Injunction against collection of special assessments. *Marion v. Pilot Mountain*, 170 N. C. 118, 87 S. E. 53.

Against city to restrain it from proceeding to revise its charter. *Gallup v. Saginaw*, 170 Mich. 195, 135 N. W. 1060.

Injunction to prevent enforcement of a charter illegally adopted will lie. *Bassel v. Shanklin* (Tex. Civ. App.), 183 S. W. 105, 107, citing § 2502, vol. 5, ante.

To restrain payment of illegal salaries, in absence of appropriation. *Thiel v. Philadelphia*, 245 Pa. 406, 91 Atl. 490.

To restrain payment of mayor's salary. *Kindricks v. Machin*, 135 Ark. 459, 205 S. W. 815.

Injunction to prevent diversion

Statutes permit the remedy in cases where irreparable injury to real or personal property is threatened and to prevent the doing of any legal wrong whatever when in the opinion of the chancellor an adequate remedy cannot be afforded by an action for damages.⁵⁷

Thus a municipality may be enjoined from polluting the waters of a stream, the same as an individual or a private corporation and if the injunction is violated the municipality and local authorities responsible for such violation may be punished for contempt.⁵⁸

So injunction lies to prevent land from being taken for a public highway without legal proceedings. If the injury is irreparable injunction will lie regardless of whether an action for damages will afford an adequate remedy. In other cases it will lie only where an action for damages will not afford an adequate remedy.⁵⁹

And equity has jurisdiction to restrain municipal officers from removing employees until the validity of such action may be determined by virtue of charters and ordinance provisions. The contest does not involve title to office.⁶⁰

of park property to other uses, streets and sidewalks, where such property was acquired for public park purposes and thereby dedicated to such use. *El Paso Union Passenger Depot Co. v. Look* (Tex. Civ. App.), 201 S. W. 714.

Complaint against maintenance of a nuisance by the municipality, held sufficient against demurrer. *Bell v. Savannah*, 139 Ga. 298, 77 S. E. 165.

⁵⁷ *Williams v. School Dist.*, 167 Mo. App. 476, 481, 151 S. W. 506.

⁵⁸ *Luther v. Batavia*, 154 N. Y. S. 784, 169 App. Div. 71.

Injunction against discharge of sewage and filth upon plaintiff's land. *Joyce v. Janesville*, 132 Minn. 121, 155 N. W. 1067, L. R. A. 1916D, 426.

Denied against maintenance of a septic tank as a nuisance by a local improvement district in Arkansas, on the ground that there was no statute authorizing action against municipal corporations or their officers "because such corporations and their officers are merely agents of the state for governmental purposes." *Jones v. Sewer Imp. Dist.*, 119 Ark. 166, 177 S. W. 838.

⁵⁹ *Carpenter v. St. Joseph*, 263 Mo. 705, 711-714, 174 S. W. 53.

⁶⁰ The injunction was asked by clerks in a municipal department who were mere employees and had held their position for some years. They contended that they could only be discharged for cause after a hearing and based their claim on

So equity has jurisdiction to order and compel the proper municipal officer to deliver to an employee of the city a warrant already issued.⁶¹

So where a municipality is vested with ample power and enters into a contract with a light company whereby the city agrees not to erect or acquire a competing plant, injunction may be invoked to prevent a violation of such contract on the part of the city.⁶²

Public officers cannot be enjoined from performing their official duties unless the act threatened by them would be without authority or in violation of law.⁶³

Thus an injunction was denied to enjoin a municipality from maintaining a garage for a police automobile on lands purchased by the city in fee simple and used

the provisions of an ordinance. The municipal officers urged that the ordinance had been repealed by the provisions of a new municipal charter. The court said that if the ordinance is still in force the employees are entitled to its protection, and if their rights under it are invaded or threatened, a court of equity has jurisdiction to enjoin the wrongdoers. A court of equity alone can give them protection. In such case, a court of law could give the employees no adequate remedy. "Suppose they should wait until they are turned out and then go into a court of law with their suit for damages, what sort of an action would it be? Whom would they sue? How would the question of liability of the defendants in their several capacities be adjusted? If a court of law could afford them any redress at all, it would be inadequate. But a court of equity could take hold of the situation in the beginning and if on a full and final hearing it should ad-

judge the plaintiffs to be right in their contention it could prevent the wrong being done, and save the innumerable law suits; and on the other hand if it should adjudge that the defendants are right in their contention, that would be the end of the controversy; the plaintiffs would go out and peace would prevail." *State ex rel. v. Lucas*, 236 Mo. 18, 30, 31.

Officer in office regularly may have injunction to prevent one from wrongfully ousting him from office. *Bonner v. Belsterling*, 104 Tex. 432, 137 S. W. 1154.

⁶¹ *State ex rel. v. Lucas*, 236 Mo. 18, 31.

⁶² *Memphis Elec. Light H. & P. Co. v. Memphis*, 271 Mo. 488, 492, 196 S. W. 1113; *Vicksburg v. Vicksburg Water Works Co.*, 203 U. S. 453, 26 Sup. Ct. 660, 50 L. ed. 1102; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. ed. 341.

⁶³ *Kingsley v. Pounds*, 160 N. Y. S. 228, 96 Misc. Rep. 27.

for a public market, where the facts disclosed no purpose of the city to use the market house in a manner to infringe upon or impair the special public use originally contemplated.⁶⁴

It is familiar law that the existence of another adequate remedy will preclude injunction.⁶⁵

§ 2504. Same—enforcement of ordinance.

An injunction to prevent the enforcement of an ordinance vacating an alley can only be granted at the instance of specially interested property owners, as for example, abutters.⁶⁶

Injunction was properly denied to restrain a city from proceeding under an annexation ordinance to add part of complainant's land, where the landowner had an exclusive statutory remedy.⁶⁷

§ 2505. Injunction by municipal corporation.

Power to abate and compel the abatement of public nuisances is authority to maintain an action by injunction to compel the abatement.⁶⁸

⁶⁴ Neil v. Kansas City, 194 Mo. App. 282, 188 S. W. 919.

⁶⁵ Injunction to enjoin a municipality from maintaining a ditch denied on ground of existence of other adequate remedy. Dobbs v. Gillett, 119 Ark. 398, 177 S. W. 1141.

⁶⁶ The owners of land which lies only along the rear end of a public alley extending into a block, not being abutting owners, if the alley is vacated, sustain only such damages as are common to the public generally, and are not thereby entitled to a decree nullifying an ordinance vacating an alley. Kingshighway Supply Co. v. Banner Iron Works, 266 Mo. 138, 148, 151, 181 S. W. 30.

The property situate at the end of an alley, held not abutting property within the meaning of a particular law. Friscoville Realty Co. v. Police Jury, 127 La. 318.

⁶⁷ Parkin v. New Kensington Borough (Pa. 1919), 105 Atl. 629.

⁶⁸ Kenesaw v. Chicago, B. & Q. R. Co., 91 Neb. 619, 136 N. W. 990, following Red Wing v. Guptil, 72 Minn. 259, 75 N. W. 234, 41 L. R. A. 321, 71 Am. St. Rep. 485, and disapproving Ottumwa v. Chinn, 75 Iowa 405, 39 N. W. 670.

Injunction by city to abate a nuisance. Kenesaw v. Chicago, B. & Q. R. Co., 91 Neb. 619, 136 N. W. 990; Santa Ana v. Santa Ana Valley Irrigation Co., 163 Cal. 211, 124 Pac. 847.

But a grant of power to abate a nuisance by summary proceedings confers no power on the city to proceed to abate it by injunction in a court of equity. "This for the reason that a suit in equity is not a summary proceeding."⁶⁹

A municipality cannot enjoin that as a nuisance which is not a nuisance in fact, since a nuisance cannot be made one by mere declaration of charter or ordinance, e. g., to compel the removal of a small, one-story frame office building on the ground that the building was erected without the necessary permit from the city authorities.⁷⁰

Notwithstanding the title of a municipality to a street is good and sufficient and such title may be protected by an adequate remedy at law, the city may invoke the remedy of injunction to restrain the enclosure of such street. The title of the city, of course, is for the use of the public, and closing the street would deprive the public of its use and the injunction is to protect the public and not title.⁷¹

A municipality may sue by injunction to enforce its ordinances limiting street car fares.⁷²

§ 2507. Recovery of involuntary payments made to municipal corporations.

A payment of road and bridge taxes belonging to a township made to a city under the mistaken view that under the law the taxes so paid belonged to the city is no bar to a recovery by the township of the money so paid. The rule that payment made in mistake of law

⁶⁹ *Billings Hotel Co. v. Enid* (Okla.), 154 Pac. 557, denying injunction by a city to abate as a nuisance the sale of intoxicating liquors in a rooming house. "As the city's charter contains no grant of power authorizing the city to restrain a nuisance within its borders, the city may not invoke the power of a court of equity so to do."

⁷⁰ *Buffalo v. Kellner*, 153 N. Y. S. 472, 90 Misc. Rep. 407.

⁷¹ *Keystone Commercial Co. v. Maysville*, 154 Ky. 239, 157 S. W. 25, 27.

⁷² *Lake Charles v. Lake Charles Ry. L. & W. Co.* (La. 1918), 80 So. 260, 262, citing § 806, vol. 2, ante, and § 1767, vol. 4, ante.

cannot be recovered was held not applicable to a municipality.⁷³

One paying money as immunity from arrest for the privilege of selling pop corn, etc., on a street corner cannot recover it from the city.⁷⁴

A county treasurer who pays a warrant not yet payable may by action recover the money so irregularly disbursed.⁷⁵

⁷³ *Lamar Township v. Lamar*, 261 Mo. 171, 183, et seq. 169 S. W. 12.

Refund provided by statute of excess payments of local assessments. *Chehalis v. Robinson*, 87 Wash. 690, 152 Pac. 696.

⁷⁴ "What he sought was immunity, and it was granted. If it was unlawfully granted, he was in *pari delicto*, and the law will not aid him to recover back the money which, so far as he is concerned, represents value received." "In *pari delicto*, *potior est conditio defendantis*." *Brush v. Helena*, 54 Mont. 254, 169 Pac. 285.

⁷⁵ He "is the custodian of the county funds and sues in his official capacity. He is the agent of the county for the purposes defined by law, and the public is bound to take notice of the limitations of his agency. He cannot give away county funds or disburse them contrary to law. Any such disbursement is entirely invalid." *Morrow v. Surber*, 97 Mo. 155, 161.

"Officers are creatures of the law whose duties are usually provided for by statute. In a way they are agents, but they are never general agents in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow

their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person applies to an officer. The law which fixes his duties is his power of attorney; if he neglects to follow it, his *cestui qui trust* ought not to suffer. In fact public policy requires that all officers are required to perform their duties within the strict limits of their legal authority." *Lamar Township v. Lamar*, 261 Mo. 171, 189, 169 S. W. 12.

"Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer to a suit brought by a trustee to recover private trust fund that he had been a party to the devastation. There could be no retention by color of right. With much the stronger rea-

§ 2508. Certiorari—nature and object of writ.⁷⁶

§ 2509. Same—when appeal or writ of error lies.⁷⁷

§ 2511. Same—to review acts of judicial character.

The act of a city council in dividing the city into wards, pursuant to state legislative direction, is held in Massachusetts, to be administrative or political, not judicial or quasi-judicial in character. Therefore, the discretion of the city council in performing such a duty is not sub-

son is this doctrine applicable where the interests of the whole people are involved and the authorities are accordingly numerous to this effect." *Allegheny County v. Grier*, 179 Pa. St. 639.

"The doctrine that money paid under a mistake of law cannot be recovered back will not be carried beyond settlements between private individuals." *Ada County v. Gess*, 4 Idaho 611.

⁷⁶ By statute, a remedy for honorably discharged soldier when denied the preference prescribed by law. *Butin v. Des Moines Civil Service Comrs.*, 179 Iowa 1048, 162 N. W. 565.

"The writ of certiorari is of extraordinary nature. It is one of the ancient prerogative writs whose history stretches far back toward the beginning of the common law. Its common purpose is the beneficent one of enabling a party who has no remedy by appeal, exceptions, or other mode of correcting error of law committed against his rights in a proceeding, judicial or quasi judicial, to bring the true record, properly extended so as to show the principles of the decision, before a higher court for examination as to the material mistakes of law. Its appropriate func-

tion is to relieve aggrieved parties from the injustice arising from errors of law committed in proceedings affecting their justiciable rights when no other means of relief are open. It always has been recognized as a highly remedial salutary procedure, founded upon a sense of justice, to relieve against wrongs otherwise irremediable. That wrongs go unredressed because of a want of adequate methods would be a grave reproach to any system of jurisprudence. The writ of certiorari not only exists as a part of the common law, but it has been sedulously preserved by the express statutes, which confer on this court a broad jurisdiction and superintendence of all courts of inferior jurisdiction 'to correct and prevent errors and abuses therein if no other remedy is expressly provided.'" *Swan v. Justices of Superior Court*, 222 Mass. 542, 111 N. E. 386, 387, 388, per Rugg, C. J.

⁷⁷ If the trial court has jurisdiction and the same has not been abused and there is ample right to redress in an appeal or writ of error after final judgment certiorari will not lie. *State ex rel. v. Goodrich*, 257 Mo. 40, 47, et seq. 165 S. W. 707.

ject to review in that state upon a writ of certiorari. "That process is available only for the purpose of examining and correcting the errors of law manifest upon the record of some tribunal in its performance of jurisdiction, and to restrain the excesses of jurisdiction of inferior courts or officers acting judicially."⁷⁸

§ 2516. Prohibition.⁷⁹

An appellate court will not prohibit a trial court from determining the power of municipal officers to remove and dismiss city employees. If the trial court errs in its ruling, it may be corrected by appeal or writ of error.⁸⁰

It is settled law that unless the court sought to be prohibited is wanting in jurisdiction over the class of cases to which the pending case belongs, or is attempting to

⁷⁸ Fitzgerald v. Boston, 220 Mass. 503, 506, 108 N. E. 355; Flanders v. Roberts, 182 Mass. 524, 529; Devlin v. Dalton, 171 Mass. 338; Attorney General v. Northampton, 143 Mass. 589; Locke v. Lexington, 122 Mass. 290.

⁷⁹ Eikhoff v. Detroit Charter Com., 176 Mich. 535, 142 N. W. 746; State ex rel. v. Railroad Comrs. (Fla. 1920), 84 So. 444.

Without jurisdiction. State ex rel. v. Hollrah, 177 Mo. App. 670, 160 S. W. 578.

Against register of voters from examining recall petition, etc. Baines v. Zemansky, 176 Cal. 369, 168 Pac. 565.

"Is not favored by the courts. Necessity alone justifies it.

* * * It is not issued as a matter of right, but only in the exercise of sound judicial discretion where there is no other remedy. * * * It is justified only by 'extreme necessity' when the grievance cannot 'be redressed by ordi-

nary proceedings at law or in equity or by appeal.' " People ex rel. v. Foley, 172 N. Y. S. 279, 281, quoting from People v. Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972.

⁸⁰ State ex rel. v. Lucas, 236 Mo. 18, 31, 139 S. W. 348.

If an inferior court has jurisdiction writ will not lie nor will it lie to restrain such court from deciding erroneously, or from executing an erroneous judgment where it has jurisdiction of the subject-matter. State ex rel. v. Frazier (N. D.), 167 N. W. 510.

Prohibition to prevent a county court from proceeding to incorporate a proposed municipality, alleging various defects, denied, as prohibition lies only where there is a lack of jurisdiction, or acts in excess of jurisdiction. State ex rel. v. Buerman, 186 Mo. App. 691, 701, following State ex rel. v. McQuillin, 260 Mo. 164, 168 S. W. 924.

act in excess of its jurisdiction in a case of which it rightfully has cognizance, prohibition will be denied. Thus where a police court has jurisdiction of all cases for the violation of municipal ordinances and the prosecutions complained of are for alleged violations of such ordinances, the writ will not lie to prevent the judge of such court from proceeding to try the pending and similar causes on the ground that the informations in the cases pending before him are all defective or for the reason that the ordinance alleged to have been violated does not cover the offense with which defendant is charged, that is, the ordinance is inapplicable to defendant's act, or because the police court is daily proceeding to assess numerous fines against defendant and the municipality will not consent to postpone the proceedings until the validity of the fines so imposed can be determined by the proper appellate court in similar causes and involving the same legal questions already pending on appeal.⁸¹

§ 2518. Equitable garnishment of municipal corporation.⁸²

III. CRIMINAL LIABILITY.

§ 2519. In general.

That a municipality may be prosecuted criminally is supported by the weight of authority. An indictment or information will lie against a municipal corporation to redress a public grievance.⁸³

⁸¹ *State ex rel. v. Tracy*, 237 Mo. 109, 140 S. W. 888.

⁸² *De Field v. Harding Dredge Co.*, 180 Mo. App. 563, 167 S. W. 593, sustaining a suit in the nature of a creditor's bill or equitable garnishment, and reviewing Missouri cases.

⁸³ *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, 43 L. R. A. (N. S.) 954, Ann. Cas. 1913E, 305; *Allen v. Decatur*, 23 Ill. 332, 76 Am.

Dec. 692; *Browning v. Springfield*, 17 Ill. 143, 63 Am. Dec. 345; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Sussex County v. Strader*, 18 N. J. L. 108, 35 Am. Dec. 530.

Criminal liability of municipalities in general, note 43 L. R. A. (N. S.) 954-956.

Liability to indictment for a nuisance. Note to *Ludlow v. Com-*

Thus in Illinois, a criminal prosecution was sustained against Chicago for permitting females employed in a hospital owned and operated by that city to work over ten hours a day in violation of a statute which prohibited the employment of females in any "public institution, incorporated or unincorporated, in this state, more than ten hours during any one day." The court reasoned that "in matters of purely local concern in which the state has enjoined the performance of specific duties, the municipality is held to the same degree of responsibility as an individual. These duties may be enjoined by the charter, by the general law or by direct legislation, but however imposed the obligation of complying with its provisions devolves upon the corporation as upon individuals. This, of course, does not apply to those discretionary powers and duties which are permissive and are voluntarily assumed by the corporation. In securing the performance of specific duties imposed upon municipal corporations, the state has the same power of coercion and the same method of redress for non-performance as in the case of individuals or purely private corporations. It would be a peculiar condition of affairs if a state could exact obedience from its citizens, fine and imprison them for violations of law, and at the same time be powerless to secure obedience to the same laws by the entity which derives its being from the state. To obtain such result there is no weapon so effective as criminal procedure by way of indictment." ⁸⁴

On the contrary, in Washington the court refused to sustain a conviction of a park district for violation of a similar law. The park district was convicted of employing females more than eight hours a day in a restaurant. The applicable statute prohibited the employment of females more than eight hours a day in any mechanical or mercantile establishment, laundry, hotel or restaurant.

monwealth, 39 L. R. A. (N. S.) 411; Southern Ry. Co. v. State, 130 Tenn. 261, 169 S. W. 1173; State v. Northumberland, 44 N. H. 628.

⁸⁴ People v. Chicago, 256 Ill. 558, 100 N. E. 194, 43 L. R. A. (N. S.) 954, Ann. Cas. 1913E, 305.

The metropolitan park district was created a special municipal corporation, to control parks, and boulevards, as a separate and distinct corporation from the municipality. The court expressed the opinion that the liability of municipal corporations to criminal indictment seems to be determined by the question whether the act complained of constitutes a nuisance; that a municipal corporation may be indicted or informed against only for misfeasance or nonfeasance in cases where a positive duty is imposed upon it and where the mental element is negligence; and that a municipal corporation is incapable of committing any offense of a purely criminal nature which has in it the element of evil intent, malice or wilful violation of the law's command. "Under our statute metropolitan park districts are municipal corporations with specific and distinct powers relating to the acquiring, maintenance and control of parks in cities of the first class. The operation of a public restaurant is not among the powers conferred, nor is it incident or necessary to any conferred power. It must be therefore regarded as an ultra vires act. Neither in this state is the regulation and maintenance of public parks a private or proprietary act of a municipal corporation, but rests purely within the governmental function of such corporations. The assumptions and reasoning of the Chicago case must therefore fail in their application here."⁸⁵

§ 2522. Liability for defective public ways.⁸⁶

⁸⁵ *State v. Metropolitan Park District*, 100 Wash. 449, 171 Pac. 254.

⁸⁶ *Sehy v. Salt Lake City*, 41 Utah 535, 126 Pac. 691.

If a municipality permits its streets to get out of repair or obstructed so as to become a public nuisance the municipality and

its officers are liable to indictment. *Southern Ry. Co. v. State*, 130 Tenn. 261, 169 S. W. 1173.

Liability for failure to repair a highway placed on the ground that the remedy existed "as a part of the common law of the land." *Reg. v. St. Sauveur Parish*, 3 Quebec, L. R. 283.

CHAPTER 50.

QUO WARRANTO.

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| § 2526. Nature and purpose—when writ will issue. | § 2532. Ouster from exercise of franchise. |
| § 2529. To test existence of office—ouster. | § 2533. Parties plaintiff. |
| § 2531. Questioning annexation proceedings. | § 2534. Parties defendant. |
| | § 2535. Sufficiency of information. |

§ 2526. Nature and purpose—when writ will issue.

The office of an information in the nature of a quo warranto is to oust an usurper from a public office into which he has intruded. In such case the state seeks to recover, not so much on the strength of its own title as upon the weakness or defects in the respondent's title which it calls upon him to establish.¹

Where one is elected to an office, as that of alderman, and receives his certificate of election from the designated officer, but is refused a seat in that body by a majority of its members, the remedy, it is held in Missouri, is not quo warranto, but mandamus to compel a canvas of the election returns and certify the election.²

The writ lies, it has been held in Washington, in favor of a foreman of a construction work, although not an "officer," where the charter applies the merit system to all employees on the civil service list, and classifies such positions as offices as to removal.³

§ 2529. To test existence of office—ouster.⁴

¹ State v. Berkeley, 140 Mo. 184, 41 S. W. 732.

² State ex inf. v. Moss, 187 Mo. App. 151, 156, 172 S. W. 1180.

³ State ex rel. v. Fassett, 69 Wash. 555, 125 Pac. 963.

⁴ Try title to office. Roanoke v. Elliott (Va.), 96 S. E. 819, 826.

§ 2531. Questioning annexation proceedings.⁵

§ 2532. Ouster from exercise of franchise.⁶

§ 2533. Parties plaintiff.⁷

§ 2534. Parties defendant.⁸

§ 2535. Sufficiency of information.

An information filed at the instance of a private person to oust the incumbent and obtain possession of the office must allege facts sufficient to show that the claimant is

To test title to office, abolished in Oregon and statutory remedy substituted therefor. *State ex rel. v. Tillamook Port*, 62 Or. 332, 124 Pac. 637.

Quo warranto will lie against officers holding under a charter illegally adopted. *Bassel v. Shanklin* (Tex. Civ. App.), 183 S. W. 105, 107.

⁵ *State ex rel. v. Tillamook Port*, 62 Or. 332, 124 Pac. 637.

"Quo warranto is generally recognized as the proper method of seeking relief where a municipality undertakes to exercise control over disputed territory." "A question as to the true boundary of a municipal corporation cannot ordinarily be raised by an individual and an action by the state seems the appropriate means of settling a controversy in that regard. * * * An action by the state against a city to determine by what right it exercises corporate powers over a specified territory is a proper proceeding by which to determine the true boundary line, and whether the alleged fault of the defendant lies in extending

its territorial jurisdiction too far, or in confining it within too narrow limits." *State v. Hutchinson*, 102 Kan. 325, 169 Pac. 1140.

⁶ Will lie to test the constitutionality of provisions of a commission or freeholder's charter. *State ex rel. v. St. Paul*, 128 Minn. 82, 150 N. W. 389.

⁷ In a proceeding upon the information of the legal representative of the state, to preclude a public service company from exercising a lighting franchise the municipality in which the franchise is exercised may appear as relator. *State ex inf. v. Light & Development Co.*, 246 Mo. 618, 637, 152 S. W. 67; *State ex rel. v. East Fifth St. Ry. Co.*, 140 Mo. 539, 547, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742.

⁸ To oust an employee of a commissioner of a department, the commissioner in his official capacity is a proper party defendant. Two actions need not be instituted where one will suffice. *State ex rel. v. Fassett*, 69 Wash. 555, 125 Pac. 963.

entitled to the office and that the respondent is an intruder.⁹

⁹ State ex inf. v. Moss, 187 Mo. App. 151, 156, 172 S. W. 1180.

At instance of private relator by virtue of Ohio statute, held must show, first, that he is legally entitled to the office, and second,

that defendant unlawfully holds and exercises the duties thereof.

State ex rel. v. Butterfield, 92 Ohio 428, 111 N. E. 279; Wasson v. Taylor, 50 Ohio St. 120, 38 N. E. 24.

CHAPTER 51.

MANDAMUS.

I. GENERAL CONSIDERATION.

II. SPECIFIC INSTANCES WHERE WRIT WILL BE GRANTED OR REFUSED.

I. GENERAL CONSIDERATION.

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| § 2545. Clear legal right to performance. | § 2548. Discretionary acts. |
| | § 2549. Ministerial acts. |

II. SPECIFIC INSTANCES WHERE WRIT WILL BE GRANTED OR REFUSED.

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| § 2551. To induct into, or reinstate to, office or public situation. | § 2560. To compel calling an election. |
| § 2554. To compel payment of claims or issue of warrants for salaries fixed by law. | § 2561. Concerning elections and officers thereof. |
| § 2555. To compel signing or issuing warrants. | § 2562. To compel the award of contracts. |
| § 2556. To compel payment of indebtedness. | § 2564. To compel the granting of licenses and permits. |
| | § 2566. Miscellaneous instances. |

I. GENERAL CONSIDERATION.

§ 2545. Clear legal right to performance.¹

§ 2548. Discretionary acts.

Mandamus will lie to correct or control the action of administrative bodies and other tribunals, irrespective

¹State v. Indianapolis (Ind. 1919), 123 N. E. 405, 407.

“Mandamus is a strictly legal remedy, and to entitle a relator to the writ he must show a clear legal right to it.” People v. Chicago, 277 Ill. 394, 396, 115 N. E.

570, affirming 200 Ill. App. 35.

“In order that a writ of mandamus may be available, it is essential that the relator have a clear legal right to the thing demanded, and it must be the imperative duty of respondent to perform the act

of official discretion vested in them where it is obvious they have refused to exercise such discretion in a lawful manner, impartially and in good faith.²

Clearly the discretion in the eye of the law is a sound legal discretion, not a capricious, arbitrary or oppressive one.³

§ 2549. Ministerial acts.

The duties of a board of canvassers to canvass election returns, being purely ministerial, are of a class the performance of which may be compelled by mandamus.⁴

II. SPECIFIC INSTANCES WHERE WRIT WILL BE GRANTED OR REFUSED.

§ 2551. To induct into, or reinstate to, office or public situation.

If the duty to appoint to office is an imperative ministerial one, it seems mandamus will lie to compel the performance of such duty; but if such duty is discretionary, the writ will not lie.⁵

The writ is generally denied, to try title to office, the title of which is in dispute,⁶ but such remedy may be invoked for this purpose in Virginia.⁷ In West Virginia "mandamus lies to admit to office the rightful claimant thereof, the only condition being that relator must show

required." State ex rel. v. Willow Springs (Mo. 1916), 183 S. W. 589, 592; State ex rel. v. Appling, 191 Mo. App. 589, 592, 177 S. W. 751; State ex rel. v. Dreyer, 183 Mo. App. 463, 481, 167 S. W. 1123.

Can compel the performance of a duty, but cannot create a legal duty, e. g. to compel a city council to make a tax levy for school purposes, prior to report of school board to council, for until such time such legal duty is not enjoined by law upon the council. Dayton

v. Dayton Board of Education, 181 Ky. 574, 580.

² State ex rel. v. Dreyer, 183 Mo. App. 463, 481, 167 S. W. 1123.

³ State ex rel. v. Grand River Township Board, 188 Mo. App. 266, 269, 175 S. W. 139.

⁴ State ex inf. v. Moss, 187 Mo. App. 151, 156, 172 S. W. 1180.

⁵ State ex rel. v. Warrior, 181 Ala. 642, 62 So. 69.

⁶ Section 2551, vol. 5, ante.

⁷ "It is said that the practice of trying title to office by man-

a clear prima facie right thereto, shown by a commission, certificate or other legal evidence thereof.”⁸

§ 2554. To compel payment of claims or issue of warrants for salaries fixed by law.⁹

§ 2555. To compel signing or issuing warrants.¹⁰

Mandamus to compel the issuance of warrants to pay judgments against the city, cannot be defeated by the de-

damus is sustained by a line of decisions covering over a century of the state's judicial history, and that it is now the well settled practice of the state, and affords a simple, expeditious, adequate and complete remedy in such cases.” *Roanoke v. Elliott* (Va. 1918), 96 S. E. 819, 826; *Sinclair v. Young*, 100 Va. 284, 289, 40 S. E. 907.

⁸ *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985 L. R. A. 1917A, 1244; *Schmulbach v. Speidel*, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922; *Kline v. McKelvey*, 57 W. Va. 30, 49 S. E. 896.

“That in the Virginias mandamus lies to admit to office one who shows the legal right thereto there can be no question. It is sometimes said that title to office may be settled by mandamus. This statement is not accurate. There are many contests for office which cannot be settled by mandamus proceedings. It is where one's title to office is as a matter of law settled that mandamus because of his legal right will admit him thereto. An examination of the subject throughout the cases will lend support to no other view. The gist of it all is that to admit one to office by mandamus or, to use the inaccurate expression, to settle

title to office by that remedy, a clear legal right to the office must be shown by the claimant.” The question whether the claimant is qualified is not cognizable in mandamus. *Martin v. White*, 74 W. Va. 628, 82 S. E. 505; *Hutton v. Holt*, 52 W. Va. 672, 44 S. E. 164; *Trunick v. Northview* (W. Va.), 91 S. E. 1081.

⁹ To compel allowance of claim. *Burr v. San Francisco*, 30 Cal. App. 755, 159 Pac. 458.

To compel payment of salary. *State ex rel. v. Gilbert*, 163 Mo. App. 679, 149 S. W. 505.

Mandamus will lie to compel the proper municipal officer to sign a warrant for the salary of a duly elected and acting public officer, and in such case inquiry into the title to the office is not allowed. *State ex rel. Frank v. Goben*, 167 Mo. App. 613, 618, 152 S. W. 93.

See § 2261, ante; § 2261, vol. 5, ante.

¹⁰ *Wycoff v. Strong*, 26 Idaho 502, 144 Pac. 341; *State ex rel. v. Goben*, 167 Mo. App. 613, 618, 152 S. W. 93.

See § 2261, ante.

To compel city controller to issue bonds. *Detroit v. Engel*, 202 Mich. 536, 168 N. W. 462.

See § 2347, ante.

fense that the city has no funds to pay them.¹¹ When funds become available such warrants may be paid.

§ 2556. To compel payment of indebtedness.

Mandamus will lie to enforce the collection of a judgment against a municipality.¹² It will also lie to compel the municipal authorities to issue tax bills in the manner and on the property chargeable contemplated by the law.¹³

§ 2560. To compel calling an election.¹⁴

§ 2561. Concerning elections and officers thereof.¹⁵

Where one has been elected to the office of alderman and received his certificate of election from the mayor, but has been refused a seat in the body by a majority of its members, his remedy is mandamus to compel a can-

¹¹ Symons v. United States, 252 Fed. 109, 111.

¹² State ex rel. v. Willow Springs (Mo.), 183 S. W. 589.

¹³ State ex rel. v. Chillicothe, 237 Mo. 486, 141 S. W. 602.

¹⁴ To compel city council to perform duty involving no discretion e. g. to call an election to elect city officers. State ex rel. v. Hinton, 76 W. Va. 610, 87 S. E. 358.

To compel municipal officer to call an election. Coney v. Topeka, 96 Kan. 46, 149 Pac. 689.

Lies to compel mayor to issue proclamation of election where the duty is mandatory and ministerial. State ex rel. v. Bently, 98 Kan. 442, 157 Pac. 1197.

To compel calling election to vote on change of form of government. Territory ex rel. v. Roswell, 16 N. Mex. 340, 117 Pac. 846.

To compel city council to call an election, at which is to be submitted, a freeholder's charter for adoption or rejection. State ex rel.

Lowe v. Barlow, 129 Minn. 181, 151 N. W. 970.

To compel giving official notice of a resolution declaring for a general revision of a charter. Jackson v. Harrington, 160 Mich. 550, 125 N. W. 383.

To compel submission of charter amendments to electors. Attorney General v. Detroit, 168 Mich. 249, 133 N. W. 1090.

To compel council to submit a resolution to a referendum. Hoping v. Richmond, 170 Cal. 605, 150 Pac. 977.

To compel council to submit a proposed ordinance to electors, will not issue if ordinance would be void. State ex rel. v. White, 36 Nev. 334, 136 Pac. 110.

¹⁵ To prevent holding a special election to amend a city charter not authorized by law. Attorney General v. Detroit, 164 Mich. 369, 128 N. W. 879, 17 Detroit Leg. N. 1136.

vass of the election returns and certify the result. Such duties are purely ministerial.¹⁶

§ 2562. To compel the award of contracts.

The discretion vested in public officers to reject bids for public work or for the custody of public funds is a legal and fair discretion, to be exercised impartially and in good faith, as distinguished from an arbitrary, capricious or oppressive discretion.¹⁷

§ 2564. To compel the granting of licenses and permits.¹⁸

If the issuance of the license or permit is discretionary with the officer or municipal board, it is clear that it cannot be compelled by mandamus.¹⁹

¹⁶State ex rel. v. Moss, 187 Mo. App. 151, 156, 172 S. W. 1180; State ex rel. v. Stuckey, 78 Mo. App. 533; State ex rel. v. Garesche, 65 Mo. 480, 489.

¹⁷State ex rel. v. Dreyer, 183 Mo. App. 463, 481-490, 167 S. W. 1123; State ex rel. v. Grand River Tp. Board, 188 Mo. App. 266, 269-271, 175 S. W. 139.

¹⁸Permit. Stubbs v. Scott, 127 Md. 86, 95 Atl. 1060.

Permit to alter building. People ex rel. v. Roberts, 153 N. Y. S. 143, 90 Misc. Rep. 439; People ex rel. v. Moore, 165 N. Y. S. 840, 179 App. Div. 121, (to compel officer to act on application for permit); State ex rel. v. Cunningham, 97 Ohio 130, 119 N. E. 361, (denying mandamus); State ex rel. v. Minneapolis, 136 Minn. 479, 162 N. W. 477; Mobridge v. Brown, 39 S. D. 270, 164 N. W. 94; State ex rel. v. Harper, 166 Wis. 303, 165 N. W. 281; Spann v. Dallas (Tex. Civ. App.), 189 S. W. 999.

Permit for construction of build-

ing. Meyers v. Houghton, 137 Minn. 481, 163 N. W. 754.

Permit to erect a building, denied under particular facts. Baltimore v. Scott, 131 Md. 228, 101 Atl. 674.

Permit to repair building. Crossman v. Galveston (Tex. Civ. App.), 204 S. W. 128.

Building permit refused because of ordinance restrictions which were void. People ex rel. v. Chicago, 260 Ill. 150, 102 N. E. 1039.

Granted to compel issuance of license to conduct a garage, applying doctrine of estoppel in pais against municipality. People ex rel. v. Thompson, 209 Ill. App. 570.

License to sell liquor. State ex rel. v. Ackerly, 69 Fla. 23, 67 So. 232.

¹⁹Discretion in issuing and renewing dramshop license under particular laws. State ex rel. v. Long, 164 Mo. App. 658, 147 S. W. 1116.

The granting of license to run a pool room is discretionary, and

The petitioner must show a clear legal right to the writ and a clear neglect of duty on the part of the public officer to perform the act sought to be enforced. For example, one who seeks to compel a city to issue to him a permit for the erection of a building must show compliance with all the valid requirements of the building ordinances and regulations.²⁰

§ 2566. Miscellaneous instances.

In a proper case mandamus may be invoked to compel a performance of the following acts: turning over funds to a municipality;²¹ issuance of correct tax bills for public improvements;²² approval and registration of a plat of city lots for an addition;²³ correction of illegal acts on the part of the civil service commission;²⁴ a mayor to refrain from attempting to remove an officer without authority;²⁵ municipal authorities to remove obstructions to streets that constitute a public nuisance;²⁶ an officer to do his duty, to remove unlawful roof sign structure;²⁷

hence, cannot be compelled by mandamus. It is not a matter of personal right as in case of a useful occupation. *State ex rel. v. Adair County Court*, 177 Mo. App. 12, 163 S. W. 279.

Permit to make changes in tenement house denied, where permit had been denied by building commissioner. *State ex rel. v. Cunningham*, 97 Ohio 130, 119 N. E. 361.

²⁰ *People v. Chicago*, 280 Ill. 576, 580, 117 N. E. 779; *People v. Busse*, 248 Ill. 11, 93 N. E. 327.

²¹ *West Linn v. Tufts*, 75 Or. 304, 146 Pac. 986.

²² *Likes v. Rolla*, 190 Mo. App. 140, 176 S. W. 520.

²³ "Where the provisions of the statutes and the ordinances of the city have been complied with in

the making of a plat for an addition to the city, the duty of the council to approve the plat is ministerial and may be enforced by mandamus." *People ex rel. v. Massieon*, 279 Ill. 312, 116 N. E. 639.

To compel approval of plat of township land. *Klug v. Auditor General*, 194 Mich. 41, 160 N. W. 589.

²⁴ *Slavin v. McGuire*, 205 N. Y. 84, 98 N. E. 405, affirming 128 N. Y. S. 1146, 144 App. Div. 910.

²⁵ *Cunningham v. Rockwood*, 222 Mass. 574, 111 N. E. 409, 412.

²⁶ *Harman v. Parsons*, 81 W. Va. 197, 94 S. E. 135.

²⁷ *People ex rel. v. Ludwig*, 218 N. Y. 540, 113 N. E. 532; *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 111 N. E. 470.

city officer to enforce an ordinance prescribing fire limits and directing the demolition of buildings erected in violation thereof;²⁹ the inauguration of a double platoon system in the fire department, which had been sustained by a vote of the electors, but which the council declined to put into force pleading want of funds;³⁰ a police judge to issue a warrant of arrest for violation of a valid ordinance.³¹

But mandamus will not issue to compel a mayor to sign a void ordinance,³² nor to compel a city to remove ashes produced from burning coal to heat an apartment. "The duty of removing ashes from buildings where they are produced rests primarily upon the owner or occupant. While the city may, we think, by appropriate legislation voluntarily assume that duty and relieve the owner of the burden, it cannot be compelled to do so."³³

²⁹ *Beem v. Davis*, 31 Idaho 730, 175 Pac. 959, 962, citing § 804, vol. 2, ante.

³⁰ *State ex rel. v. Everett*, 101 Wash. 561, 172 Pac. 752.

³¹ "Mandamus will lie to compel an inferior tribunal to act, but not to control its judgment. * * * Since the pleadings show there was a valid city ordinance and it is admitted that the affidavit was

sufficient, we think it was the duty of the magistrate to issue the warrant, and upon refusal to act, he can be compelled to do so by mandamus." *Marshall v. Herndon*, 161 Ky. 232, 234, 170 S. W. 623.

³² *State ex rel. v. Woody*, 90 Wash. 501, 156 Pac. 534.

³³ *People v. Chicago*, 277 Ill. 394, 115 N. E. 570, affirming 200 Ill. App. 35.

CHAPTER 52.

CITIZENS AND TAXPAYERS' SUITS.

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| <p>§ 2575. Propriety of action in general.</p> <p>§ 2576. Same—statutory provisions.</p> <p>§ 2577. Same—New York statutes.</p> <p>§ 2578. Same—effect of remedy at law.</p> <p>§ 2581. Certiorari as remedy.</p> <p>§ 2582. Actions in behalf of municipality.</p> <p>§ 2583. Right of taxpayer to intervene or defend.</p> <p>§ 2584. Motive of plaintiff immaterial.</p> <p>§ 2585. Who may sue.</p> <p>§ 2586. Same—pecuniary interest.</p> <p>§ 2587. Same — injury different from that sustained by other taxpayers.</p> <p>§ 2588. Same—estoppel to sue.</p> <p>§ 2590. Acts which may be enjoined.</p> <p>§ 2591. Same—passage and enforcement of ordinances.</p> | <p>§ 2592. Same — acts relating to bonds.</p> <p>§ 2593. Same—making or performance of illegal contracts.</p> <p>§ 2594. Same—letting of contracts where competitive bids required.</p> <p>§ 2595. Same—incurring indebtedness above debt limit.</p> <p>§ 2596. Same—unlawful expenditure or diversion of funds.</p> <p>§ 2597. Same—levy and collection of taxes.</p> <p>§ 2599. Same—collection of judgment.</p> <p>§ 2600. Same—misuse of municipal property.</p> <p>§ 2601. Demand before suit.</p> <p>§ 2602. Parties, pleading and proof.</p> <p>§ 2603. Judgment.</p> |
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§ 2575. Propriety of action in general.

Apart from statutory authorization, or a violation of his recognized legal rights in common with other taxpayers similarly situated, a taxpayer as such, it is stated in late New York decisions, has no right to demand either at law or in equity, the vindication of the public right, or to restrain or prevent the waste of public funds or injury to public property, or to enjoin a threatened unlawful official act.¹

¹ *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216; *Schieffelin v. Craig*, 170 N. Y. S. 603, 609.

to compel compliance with law. *Levering v. Williams* (Md. 1919), 106 Atl. 176.

Taxpayer's action by mandamus Taxpayer's action. *People v.*

In a recent Pennsylvania case a municipality had borrowed a sufficient sum of money in a lawful manner to improve a particular street. Thereafter steps were being taken to charge the abutting property on the street to be improved with the cost thereof. A taxpayer owning abutting property on such street sought to restrain the municipal authorities from so proceeding. The injunction was denied because, first (as expressed by the court), a taxpayer's bill is essentially a class bill, and can be filed only in the common interest of all of the taxpayers of the municipality, to prevent the wrongful expenditure of public money or the wasting of the assets of the municipality, whereas the present bill was not filed to prevent the expenditure of public money, but to compel its expenditure for the benefit of the plaintiff and the landowners on the street to be improved, who were a part only of the taxpayers of the municipality; and, second, if in the contemplated improvement in the manner stated the municipal authorities should file a claim against plaintiff's property, he might defend, and thus he had an adequate remedy at law.²

In invoking the doctrine of an early Pennsylvania case that "in order to enable a plaintiff to sue on behalf of himself and others who stand in the same relation with him to the subject of the suit, it must appear that the relief sought by him is in its nature beneficial to all those whom he undertakes to represent," the court remarked "that the principle is sound and so far as we are aware has never been departed from."³

Holten (Ill. 1919), 122 N. E. 540.

"Citizens and taxpayers have no standing as such for championing the rights of the public in abating a nuisance." They complained that a hospital about to be constructed and put into operation would endanger their health and that of their families. *Le Bourgeois v. New Orleans* (La. 1919), 82 So. 268, 270, 271.

² *Schlanger v. West Berwick, Borough*, 261 Pa. 605, 104 Atl. 764.

³ *Schlanger v. West Berwick Borough*, 761 Pa. 605, 104 Atl. 764; quoting with approval from *Gray v. Chaplin*, 2 Sim. & Stew. (Pa.), 267.

Taxpayers have the right, it has often been held, to protect their interests and those of the public generally by means of an injunction to prevent unlawful appropriations and the squandering of public money,⁴ and where public money has been unlawfully paid out by the direction of the mayor and a majority of the members of the council and it is apparent from the facts that such officers would not take the necessary steps to institute an action to recover such sum from themselves, and thus restore it to the municipality, and that it would be futile to insist that demand should be made upon them to commence such an action for this purpose, in Wisconsin it has been held that, resident taxpayers may sue for and in their own behalf and all other taxpayers of the city to compel restoration of such money to the city treasury.⁵

⁴ A taxpayer may invoke injunction to restrain municipal corporations or their officers from exceeding their lawful powers or violating their legal duties in any manner which will affect injuriously the taxpayer; e. g. making an unauthorized appropriation of the corporate funds or an illegal disposition of corporate property. *Williams v. School District*, 167 Mo. App. 476, 481, 151 S. W. 506.

"The rule is, well settled that, in the absence of legislation restricting the right to some public officer, the courts will, upon the application of one or more of the individual taxpayers interfere by appropriate process to prevent an unlawful expenditure of public money by the officers of the corporation or the incurring of an obligation which will render such expenditure necessary. There never has been any such restrictive legislation in this jurisdiction, and from an early date in the history of the state the right of the taxpayer

to maintain an action to prevent or restrain misuse of corporate power has been recognized and enforced." *Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276.

⁵ *Wilcox v. Porth*, 154 Wis. 422, 143 N. W. 165.

"Taxpayers of a municipality have a right to examine its books and records at any proper time for any legitimate purpose. * * * They may also proceed in equity to enjoin municipalities and their officers from misappropriating public funds under their control. Such right is grounded on the relation which taxpayers bear to the municipality which relation is analogous to that existing between the stockholders of a private corporation and the corporate entity. By reason of such relation public funds under the control of the municipality and its officers belong beneficially to the taxpayers, and hence where the necessity to do so exists they may take steps to protect such funds. When the

General taxpayers may maintain a suit in equity to restrain the performance of a street paving contract if it is made to appear that it is invalid and that loss will ensue to the general taxpayers through its performance. In such suit they are not recognized as standing for any direct interest of their own. They represent only the interests of the general taxpayers.⁶

And a bill by taxpayers to restrain a village from purchasing instead of condemning land needed, as required by law, was sustained, without averment and proof of fraud. Nor in such case can there be waiver or estoppel as against taxpayers.⁷

So a citizen may sue to recover back money paid out by a city to a contractor on a paving contract made without an ordinance and without advertising for bids, as required by law.⁸

§ 2576. Same—statutory provisions.

The *Kansas statute* authorizes an injunction to restrain the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; or to enjoin any pub-

misappropriation of public funds has been accomplished and the municipality and its proper officers on demand refuse to proceed to cause such funds to be restored, taxpayers in the interest of themselves and all others similarly situated may take steps to recover such funds in behalf of the municipality and to that end and may conduct investigations, commence and prosecute actions, etc. In any such action, however, the complaint must affirmatively disclose their interest as that they are taxpayers. * * * Where by steps they are authorized to take as measured by the foregoing propositions, taxpayers cause to be restored to the

municipality public funds theretofore wrongfully sequestered or misappropriated, they may retain out of the fund or recover from the municipality their reasonable costs and expenses incurred including the reasonable expenses of procuring the services of expert accountants." *Michigan City v. Marwick* (Ind. App.), 116 N. E. 434, 436.

⁶*Berger v. Superior*, 166 Wis. 477, 166 N. W. 36; *Kircher v. Pederson*, 117 Wis. 68, 93 N. W. 813.

⁷*Head v. Wood River*, 194 Ill. App. 104, 110.

⁸*Lincoln v. Thompson*, 190 Ill. App. 536.

lic officer, board or body from the entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment; and allows any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act to unite in the petition filed to obtain such injunction. Actions under this statute have been frequently sustained.⁹

An individual taxpayer may maintain such action.¹⁰

Under the *Montana statute*, it seems that a complaint for an injunction by a resident taxpayer must disclose special injury to such complainant, "which is essential to entitle him to an injunction."¹¹

The *Oklahoma statute*, among other things, provides in substance that in event of an illegal or fraudulent payment of money or transfer of property of the public, any resident taxpayer affected, after demand on the appropriate authorities to institute the proper proceedings by ten or more resident taxpayers, may in the name of the state commence and maintain any suitable action to recover, etc., to which action the municipality shall be made a party defendant; and one-half of the amount of money and one-half the value of the property recovered shall be paid to such resident taxpayer as a reward.¹²

§ 2577. Same—New York statutes.¹³

Various New York legislatures have recognized that

⁹ *Hartzler v. Goodland*, 97 Kan. 129, 154 Pac. 265.

¹⁰ *Arnhold v. Klug*, 97 Kan. 576, 155 Pac. 805; *Meistrell v. Ellis County*, 76 Kan. 319, 91 Pac. 65.

¹¹ *Larkin v. Butte*, 52 Mont. 410, 158 Pac. 316.

¹² *State ex rel. v. Muskogee* (Okl.), 172 Pac. 796.

The statute does not authorize an action to be maintained in the name of the state on relation of

a county attorney. *Territory ex rel. v. Woolsey*, 35 Okl. 545, 130 Pac. 934, 937.

Demand by the named number of taxpayers is a condition precedent to sue. *State v. Oklahoma City* (Okl.), 168 Pac. 227.

In an action to recover the penalty, the burden is on the plaintiff. *Buckeye Engine Co. v. Cherokee* (Okl.), 153 Pac. 1166.

¹³ *McBride v. Ashley*, 154 N. Y.

the condition as developed in that state under the common law rule was inadequate to protect the public rights where public officials who were charged with the enforcement of the law were themselves guilty of waste of or injury to public funds or property, or illegal official acts, which resulted in the enactment of the statutes set out in this work¹⁴

Concerning this legislation a late case declared: "The purpose of the statutes authorizing a taxpayer's action is not to confer upon the taxpayer the power to bring actions which the public authorities have no power to bring, but these statutes are designed to confer upon the taxpayer the right to bring such an action in the cases specified in the statute which are cases where the relief sought could be obtained by appropriate proceedings on the part of public officers." ¹⁵

Hence, where a municipality has a just cause of action which it should prosecute, but refuses a taxpayer's action is proper to redress the wrong to the corporation and it may be made defendant representing all its members.¹⁶ Further: "The mere illegality of the official act in and of itself does not justify injunctive relief at the request of the taxpayer. To be entitled to this relief when waste or injury is not involved it must appear that in addition to being an illegal official act the threatened act is such as to imperil the public interests or calculated to work public injury or produce some public mischief." ¹⁷

S. 1010, 91 Misc. Rep. 585; *Cleveland v. Watertown*, 166 N. Y. S. 286, affirming 165 N. Y. S. 305, 99 Misc. Rep. 66.

¹⁴Section 2577, vol. 5 ante.

"As a result of the many illegal and wasteful acts committed by Tweed and his associates the Legislature enacted chapter 161 of the Laws of 1872 which was the foundation for various acts of the legislature which have since been passed and have been embodied in section 1925 of the Code of Civil Proce-

dure and section 51 of the General Municipal Law (Consol. Laws, c. 24) and the right of a taxpayer to bring such an action must be found in one of said sections." *Schieffelin v. Craig*, 170 N. Y. S. 603, 183 App. Div. 515.

¹⁵*Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216, 218.

¹⁶*Carpenter v. Wise*, 155 N. Y. S. 996, 1000, 92 Misc. Rep. 246, affirmed in 159 N. Y. S. 1104.

¹⁷*Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216, 218, approving

To support a taxpayer's action it must appear that the act sought to be restrained would be illegal or there existed fraud, corruption or wrong doing. "Without such allegation and proof there is no basis for a taxpayer's action."¹⁸

"To justify the bringing of a taxpayer's action some improper motive of an officer is essential. The act complained of need not be corrupt in the sense of not being induced by a desire for pecuniary gain; but it must be done to accomplish some purpose foreign to the interest of the municipality which is tantamount to fraud. Bad judgment, even gross incompetency, is not bad faith."¹⁹

By virtue of New York legislation an action may be maintained by a taxpayer to restrain an illegal official act which is of such a character that it could be restrained upon the application of the attorney general or some body or officer acting on behalf of the public.²⁰

"The waste to be prevented by a taxpayer's action is confined to cases where the acts complained of are without power, or where corruption, fraud or bad faith amounting to fraud is charged."²¹

Rogers v. O'Brien, 153 N. Y. 357, 361, 47 N. E. 456.

¹⁸ Kingsley v. Pounds, 160 N. Y. S. 228, 230, 96 Misc. Rep. 27.

To sustain a taxpayer's action to nullify a contract made by a commission in behalf of a city with certain railroad companies as to streets, etc., fraud, corruption and bad faith on the part of the public officers must appear. McCutcheon v. Buffalo Terminal Station Com., 217 N. Y. 217, 111 N. E. 661, 668, citing § 2577, vol. 5, ante, and affirming 154 N. Y. S. 711, 168 App. Div. 301.

¹⁹ Marsch v. Seibert, 155 N. Y. S. 1083, 1085.

Taxpayer's actions cannot interfere with discretionary acts, of course, in the absence of fraud or

waste as making contracts, for whether it is for the best interests of the municipality is solely for the decision of city officers. Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; Carpenter v. Wise, 155 N. Y. S. 996, 1001, 92 Misc. Rep. 246.

Denying right of taxpayer to restrain a sewer connection with a sewer of another city. Kelly v. Miller, 139 N. Y. S. 991, 78 Misc. Rep. 584.

²⁰ Altschul v. Ludwig, 216 N. Y. 459, 111 N. E. 216, 219; Rogers v. O'Brien, 153 N. Y. 357, 361, 47 N. E. 456.

²¹ Voelcker v. Schnell, 166 N. Y. S. 420, 425.

The words "waste and injury," include only illegal, wrongful, or

Injunction brought by a taxpayer to prevent the raising of funds by taxation to satisfy a legal assessment against a municipality as its part of a street improvement, not being an action to obtain a judgment preventing the waste of or injury to the estate, funds or other property of the city, but relating only to the manner of raising funds to pay a lawful obligation of the city, will not lie under Section 1925 of the Civil Code of Procedure, nor under Section 51 of the General Municipal Law, although the latter is broader and includes action to prevent any illegal official act on the part of any officers, agents, commissioners or other persons.²²

A taxpayer's action to restrain a board of fire commissioners from permitting city employees in the fire department from doing work for the city, namely, painting fire houses and fire apparatus, was denied under the New York statutes. In such case only the firemen themselves should be permitted to raise the question. The propositions advanced to sustain the action were, in substance, that (1) it takes them from the occupation for which the city employed them, (2) it subjects them to the action of paint and turpentine upon their eyes at a time when the

dishonest acts. *Voelcker v. Schnell*, 166 N. Y. S. 420, 425; *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216.

To prevent waste as payment of salary wrongfully. *Gregory v. Simpson*, 159 N. Y. S. 1016, 173 App. Div. 6.

Taxpayer's action to prevent the waste of city funds in the nature of an application for an action pendente lite to restrain the carrying out of the proposed plan for the reconstruction of a court house. *Klinck v. Pounds*, 163 N. Y. S. 1008.

"The remedy given by the statutory provisions under which this action is brought to enjoin waste

of public funds and illegal official acts, and to compel restitution of public funds corruptly or illegally disposed of is confined to cases where fraud or corruption or illegal official acts are shown, and it was not intended to empower the courts to review discretionary action or acts of public boards or officials." *Western New York Water Co. v. Laughlin*, 157 N. Y. 257, 260.

²² *Schieffelin v. Craig*, 170 N. Y. S. 603, 609, 183 App. Div. 515, following *Rogers v. O'Brien*, 153 N. Y. 357, 361, 47 N. E. 456, and *Altschul v. Ludwig*, 216 N. Y. 459, 467, 111 N. E. 216, 218.

fire alarm may be sounded, and (3) no compulsion should be exerted but should be left to the firemen to perform the work voluntarily, if performed at all. These propositions were rejected, the court observing: "The very theory of a taxpayer's action is that the taxpayer, as the ultimate bearer of the burdens of a municipality, shall have a remedy against the illegal official acts which tend to waste the property of the public and to impose unjust burdens on the taxpayers."²³

In one case a permit to erect on a building a sky sign 141 feet was duly granted. Before anything was done under the permit an ordinance was passed limiting such signs to 75 feet. When the sign was being erected in accordance with the permit, the city declining either to revoke the permit or interfere, a taxpayer's action was begun to compel the appropriate city officer to revoke the permit and enjoin him from permitting the work to proceed. The action was denied.²⁴

In an action to restrain a building superintendent from approving plans and issuing permit for the reconstruction of a theater building in accordance with a decision of a board of examiners to which board an appeal had been taken after the superintendent had disapproved the plans and declined to issue a permit on the ground that the plans did not comply with the law, the court said that as it does not appear that the act sought to be restrained would, if performed, result in waste or injury to the funds or estate of the municipality. "If the action can be maintained, it must be because the act that is threatened is an illegal official act, and because of the nature of the act itself." "The answer to the question whether this action can be maintained must depend upon whether the threatened act is in violation of public rights or would imperil the public interests or be calculated to work a public injury." The court concluded that the

²³ *Marsch v. Seibert*, 155 N. Y. S. 1083, 1085, following *Queens County Water Co. v. Monroe*, 82 N. Y. S. 610, 83 App. Div. 105.

²⁴ *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 111 N. E. 470, reversing 153 N. Y. S. 545, 168 App. Div. 233.

plans of the proposed theater violated those provisions of the law designed to promote public safety, and reduce the risk of injury from fire, and that it was manifest that disregard of the safeguards prescribed imperiled the public interests and was calculated to produce public injury. Moreover, that a theater built in violation of the provisions to safeguards, etc., would be a public nuisance and could be abated by the attorney general by appropriate court action or by the proper public authorities, and in such circumstances, a taxpayer may maintain an action to restrain an illegal official act, that is, where it could be restrained by the attorney general or some body or officer acting in behalf of the public; and as the granting of a permit to erect such a building is also an illegal official act, it may be restrained in a taxpayer's action. As to the board's action in approving plans, although the law said its decision should be "final," "final" meant only when action was within the limitations of the applicable law, and to approve plans not in accordance with the New York Code was beyond its powers, and hence not "final."²⁵

Under the New York civil service law any taxpayer has the right to bring an action to the Supreme Court to restrain the payment of salary or other compensation to any person appointed to or holding any office, place or employment in violation of any of the provisions of the civil service law, and that statute provides that such right shall not be limited or denied by reason of the fact that such office, place or employment shall have been classified as, or determined to be, not subject to competitive examination. Under this statute the mere illegality of an appointment is sufficient to authorize the intervention of a taxpayer.²⁶

²⁵ *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216, 219, 220, affirming 155 N. Y. S. 1091.

²⁶ Rule applies to female nurse in city health department who was

not a citizen of the state under a law forbidding the employment of non-residents of the state. *Heller v. Prendergast*, 162 N. Y. S. 788, 176 App. Div. 383.

§ 2578. Same—effect of remedy at law.²⁷

The equitable remedy of an injunction under the General Municipal Law of New York, it has been held by the Court of Appeals of that state, is to be granted or withheld in accordance with the general principles which govern the exercise of equitable jurisdiction.²⁸

A fundamental principle governing the exercise of equitable jurisdiction is that equity will not act where the remedy at law is adequate; and the remedy at law is adequate where a full measure of relief is available through mandamus.²⁹

The statute was “designed to give a taxpayer a remedy under conditions where none had been available before. It was not designed to reach conditions and correct evils where the existing law gave an effective remedy at the instance of any citizen.”³⁰

§ 2581. Certiorari as remedy.³¹**§ 2582. Actions in behalf of municipality.**

A common law action cannot be maintained by a citizen and taxpayer “for the use of” a city against the mayor and commissioners of such municipality, to recover certain sums of money raised by taxation, and which were alleged to have been misappropriated and paid out by municipal officers as premiums on their official bonds. “The legal right to recover the money was in the mu-

²⁷ Schlanger v. West Berwick Borough, 261 Pa. 605, 104 Atl. 764; Berger v. Superior, 166 Wis. 477, 166 N. W. 36.

²⁸ Southern Leasing Co. v. Ludwig, 217 N. Y. 100, 111 N. E. 470; Altschul v. Ludwig, 216 N. Y. 459, 111 N. E. 216; Schiefflin v. Comfort, 212 N. Y. 520, 535, 106 N. E. 675, L. R. A. 1915D, 485.

²⁹ Southern Leasing Co. v. Ludwig, 217 N. Y. 100, 111 N. E. 470, 472.

³⁰ Southern Leasing Co. v. Ludwig, 217 N. Y. 100, 111 N. E. 470, 472.

³¹ Without injury, taxpayers cannot by certiorari have set aside a contract for the removal of garbage on the ground that too much discretion was committed to the city officers. Houghton v. Jersey City, 90 N. J. L. 689, 102 Atl. 898.

nicipality, and was never in the plaintiff, and before he could recover it in a common law action, it must appear that he had the legal right to sue."³²

A contract let without an ordinance and without advertising for bids, as required, is illegal, and where the work is performed by the contractor and accepted and paid for by the city any citizen, it has been held in Illinois, may institute an action in the name of the city on his relation as a taxpayer to recover for the city the money thus wrongfully paid out.³³

A particular statute authorizing a taxpayer to maintain an action to restrain an illegal expenditure, it was held in California, did not forbid a taxpayer from seeking to recover on behalf of the municipality the same money if illegally expended. In such case the municipality should be made a party defendant.³⁴

Under the Oklahoma statute if money is wrongfully, fraudulently or corruptly paid out and the city refuses, fails or neglects to bring suit, or where property has been unlawfully transferred and the city fails to institute action to recover it, on written notice of ten or more resident taxpayers, resident taxpayers may institute such suit in behalf of the city in the name of the state. A suit afterwards brought by the city will not affect such taxpayer's action.³⁵

A bill by state's attorney on the relation of a taxpayer and elector of the city to enjoin the enforcement of a rule of a board of education forbidding teachers in the public schools from belonging to certain societies or unions was allowed in Illinois.³⁶

An action by a resident taxpayer for himself and on behalf of the city to recover from an officer of the city funds wrongfully appropriated by him is an action at

³² *Young v. Moor*, 144 Ga. 401, 87 S. E. 401.

³³ *Lincoln v. Thompson*, 190 Ill. App. 536.

³⁴ *Osburn v. Stone*, 170 Cal. 480, 150 Pac. 367.

³⁵ *State ex rel. v. Muskogee* (Okl.), 172 Pac. 796.

³⁶ *People v. Chicago*, 199 Ill. App. 356.

law. A plain action to recover money alleged to have been wrongfully obtained from the city and appropriated by the one obtaining it to his own use contains no features of equitable cognizance.³⁷

§ 2583. Right of taxpayers to intervene or defend.

Such a bill is essentially a class bill.³⁸

"As such it must be filed in the name of and for the class, for otherwise every taxpayer would have a separate right to file a bill in his own name and right, and a multiplicity of suits and great confusion might result." Hence, a bill filed by a taxpayer in his own name and right which does not aver that it is filed for the benefit of himself and other citizens and taxpayers, is not a taxpayer's bill.³⁹

§ 2584. Motive of plaintiff immaterial.⁴⁰

§ 2585. Who may sue.

Taxpayers may sue, but the complaint must affirmatively disclose their interest as that they are taxpayers.⁴¹

³⁷ *Buck v. Bender* (Ia.), 159 N. W. 990.

³⁸ *Schlanger v. West Berwick Borough*, 261 Pa. 605, 104 Atl. 764.

³⁹ *Wilson v. Blaine* (Pa. 1918), 105 Atl. 555, 557.

⁴⁰ "Since the motives of the plaintiff in bringing this action are of no consequence, it may be unnecessary to mention what the court believes inspired the proceeding." *Marsch v. Seibert*, 155 N. Y. S. 1083.

Taxpayer must bring action in good faith to protect his own interests. If he is a mere colorable plaintiff, and the suit is in fact for the benefit of others, the action not being in good faith dismissal follows. *Stubbs v. Aurora*, 160 Ill. App. 351.

Even if not satisfied that the taxpayer is acting in good faith, the court will grant relief where it appears that the public officers acted ultra vires. *Konig v. Baltimore*, 128 Md. 465, 97 Atl. 837, 441.

⁴¹ *Michigan City v. Marwick* (Ind. App. 1917), 116 N. E. 434, 436, citing § 2585, vol. 5, ante.

Action by citizen. *Lincoln v. Thompson*, 190 Ill. App. 536.

To enjoin the removal of a school house the complainant must be a citizen and taxpayer of the school district, being a resident is not sufficient. *Williams v. School District*, 167 Mo. App. 476, 483, 151 S. W. 506.

"The full faith and credit of the city are pledged to the redemp-

A taxpayer has such interest in the funds of the municipality arising from taxation that he may maintain injunction to restrain its improper use, as the creation or payment of unlawful debts.⁴²

"It is familiar law that a general taxpayer, or an owner of property abutting upon a street, cannot enjoin the prosecution of the improvement, or the use or the obstruction of a street, where no special injury comes to him." However, in Minnesota, a taxpayer was allowed to maintain an action to enjoin a municipality and a telephone company from entering into a contemplated contract alleged to be unauthorized for the construction and operation of a telephone system within the city. "The city, if the allegation is true, is about to enter into a contract, illegal under its charter, because of a failure to advertise for proposals. The result may be a more expensive construction contract, or a franchise granted without conditions favorable to the city, or without receiving a sufficient consideration. We think the plaintiff alleges a sufficient special injury."⁴³

§ 2586. Same—pecuniary interest.⁴⁴

"Equity does not interfere with the rules or orders of an administrative officer at the suit of a taxpayer

tion of the bonds issued and the interest of the taxpayer is sufficient to give him standing in court if the city is threatening to make unlawful use of its public funds." *McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99; *Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276, L. R. A. 1916C, 395.

⁴² *Brumby v. Marietta Board of Lights & Waterworks*, 147 Ga. 592, 95 S. E. 7, 9.

"A taxpayer has sufficient interest to maintain an action to enjoin public officers from the commission of acts in excess of legal authority and requiring the ex-

penditure of public money." *Green v. State Civil Service Com.*, 90 Ohio 252, 107 N. E. 531, 532.

⁴³ *Arpin v. Thief River Falls*, 122 Minn. 34, 141 N. W. 833.

⁴⁴ Damage to the taxpayer must appear, to restrain illegal act of officer. *Maxwell v. Smith*, 87 Wash. 629, 632, 152 Pac. 530, quoting with approval part of § 2586, vol. 5, ante.

Konig v. Baltimore, 128 Md. 465, 478, 479, 97 Atl. 837, quoting with approval part of § 2586, vol. 5, ante, and saying: "The basis of our own decisions for permitting taxpayers to sue was their liabil-

unless the taxpayer and his class have sustained or will sustain some pecuniary loss therefrom.”⁴⁵

ity and that of the municipality to loss, and when a case has proceeded so far that the only live question is compensation vel non, it would be utterly illogical to grant relief beyond actual or possible loss to the taxpayer or municipality or both.”

⁴⁵ *Kasik v. Janssen*, 158 Wis. 606, 149 N. W. 398.

On the question whether a taxpayer in seeking an injunction “must show special damages, the courts are somewhat divided, but they are all a unit in holding that at least general damages must be shown.” *Maxwell v. Smith*, 87 Wash. 629, 152 Pac. 530.

An injunction to restrain the ultra vires or illegal acts of municipal corporations or officers thereof will not be granted unless it appears that the taxpayer would be injured by the acts complained of. *Williams v. Baltimore*, 128 Md. 140, 97 Atl. 140, 146.

Private individuals will not be permitted to sue to restrain public officials to correct purely public wrongs, but the right of such persons, is restricted to that class of cases which involves the creation of debts illegally against, or the wrongful expenditure of the moneys of, the taxpayers. *Thompson v. Haskell*, 24 Okl. 70, 102 Pac. 700.

Although a resident taxpayer shows no special interest he may sue to restrain illegal acts. Diversion of money raised by bond is sue. *Afton v. Gill*, 57 Okl. 36, 156 Pac. 658, 660, 661.

Unlawful disposition of money of city. *El Reno v. Cleveland Trinidad Paving Co.*, 25 Okl. 655. 107 Pac. 163, 27 L. R. A. (N. S.) 650; *Kellogg v. School District*, 13 Okl. 285, 74 Pac. 110.

In an action by an alderman, a resident, freeholder and taxpayer to enjoin contractors from making an excavation in a public street in order to construct a platform scales under permit from the council of the municipality, the Wisconsin court said: “Averment and proof that the appellant is a taxpayer gives him no standing in a court of equity to regulate or control municipal affairs, except in cases where the administrative act is unlawful and the taxpayer is threatened with or suffers a peculiar loss in consequence thereof. (*Zettel v. West Bend*, 79 Wis. 316, 40 N. W. 379, 24 Am. St. Rep. 715.) A private party cannot maintain an action for damages resulting from the obstruction of a public highway or a suit in equity to prevent such obstruction, unless it appears that he has sustained damages differing, not merely in degree, but kind, from the damages sustained by the general public. * * * The mere fact that appellant is an alderman cannot, under the circumstances, add anything to his right to maintain the action. Aldermen must, generally speaking, govern the city through the regular channels of city government, not by adversary proceedings in the courts. If appellant’s official status as a single

The proposition is incontestable that a taxpayer has a standing to enjoin unauthorized acts of a municipality where the effect of the act complained of, will probably be to increase his burden of taxation, "But in order to take advantage of it the taxpayer must show the probability of his burden of taxation being increased."⁴⁶

§ 2587. Same—injury different from that sustained by other taxpayers.

Apart from statute, the rule in New York continues to be "as has been repeatedly decided, at common law a taxpayer, as such, has no right of action against a public official to restrain or prevent the waste of public funds or injury to public property or to restrain a threatened illegal official act. The taxpayer has no right to demand, either at law or in equity the vindication of the public right, unless the violation of that right affects him injuriously in some peculiar manner in which other members of the community were not legally affected."⁴⁷

In other jurisdictions, it seems the general rule has been stated that, to warrant equitable interference the aggrieved party must show that special and peculiar injury personal to him is occurring, or likely to result from the act complained of, aside from the injury suffered by the public.⁴⁸

alderman were relevant then his vote as alderman in favor of the vote in question might also be relevant, but neither of these is relevant. He cannot maintain this action because he suffers no peculiar loss in consequence of the act sought to be enjoined, and because the wrong, if wrong it is, is to the general public, and not in the least special or peculiar to the appellant." *Warden v. LeRoy*, 162 Wis. 495, 156 N. W. 466.

⁴⁶ *Bloomfield v. Thompson*, 133 La. 209, 62 So. 634.

⁴⁷ *Schieffelin v. Craig*, 170 N. Y. S. 603, 609; *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216.

⁴⁸ *Spurrier v. Vater*, 62 Ind. App. 669, 113 N. E. 732; *Bryant v. Logan*, 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1011.

The taxpayers may have injunction to annul illegal acts of county courts when such acts would increase their burden of taxation. In such case, the injury to the taxpayers is a private one, as they are the sufferers, rather than the public. They, therefore, have a special interest in the subject-mat-

If he sustains or will sustain special injury a taxpayer may enjoin the execution of a contract for the construction of a telephone system let without competitive bidding as required.⁴⁹

§ 2588. Same—estoppel to sue.

The general rule is that there can be no waiver or estoppel as against taxpayers where there is no power in the municipality to do the act complained of.⁵⁰

However, in a given case, although the sale by a municipality to an individual of a light and water plant to be operated by the latter to supply the local community was unauthorized, where it appears that the citizens and taxpayers had full knowledge of the entire transaction, the court applied the doctrine of estoppel, limiting it, as in the opinion of the court the particular facts warranted. "The estoppel will end when the reason for it ceases." "Where the property owners have stood by and in a manner acquiesced in the transaction, they are in no position to come into a court of equity to ask the court to undo that which has been done within their knowledge and acted upon to the prejudice of the other party."⁵¹

In a taxpayer's action to test a sewer construction contract payable by assessments partly against property benefited, and partly at public expense, where it

ter of such suit distinct from the general public. *Newmeyer v. Mo. Pac. R. R. Co.*, 52 Mo. 81.

Resident of a school district cannot enjoin a removal of a school-house; only a citizen and taxpayer of the district can maintain such suit. Complainant must show that he will sustain special or pecuniary injury different from that of the public. *Williams v. School Dist.*, 167 Mo. App. 476, 483, 151 S. W. 506.

⁴⁹ *Arpin v. Thief River Falls*,

122 Minn. 34, 141 N. W. 833, saying "it is familiar law that a general taxpayer, or an owner of property abutting upon a street cannot enjoin the prosecution of the improvement, or the use or obstruction of a street where no special injury comes to him."

⁵⁰ *Head v. Wood River*, 194 Ill. App. 104, 110.

See *Garrison v. Jersey City*, 92 N. J. L. 624, 105 Atl. 460.

⁵¹ *Augusta v. Smith*, 117 Ark. 93, 174 S. W. 543, 545, 546.

appeared that the taxpayers protested against the particular sewer being constructed at public expense, or partly that and partly at the expense of abutting property, and as soon as it was evident that their protest would not be honored they instituted the action, and where it further appeared that substantially no work had theretofore been done and none was done thereafter except what was necessary to restore the street—thus such taxpayers occupying an adversary status from the first as to such particular sewer—it was held they were not estopped from asking relief as to their private rights.⁵²

§ 2590. Acts which may be enjoined.

Apart from restrictive laws or purely discretionary powers, the general rule is that citizens and taxpayers are uniformly allowed to sue to restrain unauthorized, unlawful or ultra vires acts of city or town officers under a showing that the act sought to be prevented will result in injury to the taxpayer or imperil the public interest.⁵³

⁵² *Sales v. Hartford*, 161 Wis. 136, 152 N. W. 853, 855.

⁵³ To enjoin acquisition of a public utility, without submission of question for decision to voters as law required. *Schurtz v. Grand Rapids* (Mich. 1919), 175 N. W. 421.

To restrain holding an election to vote on a franchise ordinance, because the ordinance authorizing such election had not been approved by the mayor as required. *Meyer v. Knott* (Minn. 1920), 174 N. W. 842.

To restrain the establishment of an improvement district in violation of law, not in conformity with petition of landowners. *Riddle v. Ballew*, 130 Ark. 161, 197 S. W. 27.

The New York statute authorize an action by any taxpayer, qualified as prescribed by law, against any officer, agent, commissioner, or other person, acting or who has acted for or on behalf of any municipal corporation, "to prevent any illegal official act on the part of any such officers, agents, commissioners, or other persons, or to prevent waste or injury to, or to restore and make good any property, funds or estate" of such municipality. Such statute authorizes a taxpayer's action to restrain the permission of the construction of an unlawful sign. The public has such a direct interest in the strict observance of the law, and a taxpayer may intervene to prevent a violation of the

However, a suit will not lie at the instance of a taxpayer to restrain the illegal acts of a state officer. "There is a fundamental distinction between restraining an officer of a sovereign state and the restraining of a city official."⁵⁴

Discretionary powers relating to the management of a public utility by the municipality, as a lighting plant, will not be interfered with by injunction at the instance of taxpayers; e. g., furnishing electric current to private consumers where it alleged that it is needed to light the streets and public ways of the city at such times as to result in overtaxing the machinery and equipment of the plant.⁵⁵

In operating a public utility—steam and electric plant—the city acts in a proprietary or business capacity, and it may install the necessary fixtures and appliances and conduct its operations as does a private corporation engaged in the same kind of business. It may make disposition of any surplus or by-product as will promote economy. Waste or exhaust steam from its electric light plant may be sold and the city may at public expense lay the mains or conduits necessary to convey it to places where there is a demand for its use, and there install the appliances necessary to enable it to meet the demand. At the suit of taxpayers equity will not attempt to direct or restrain the exercise of such discretionary powers.⁵⁶

law, thus doing what the officers of the municipality ought themselves to do. *Southern Leasing Co. v. Ludwig*, 153 N. Y. S. 545, 547, 548, 168 App. Div. 233, approving *Brill v. Miller*, 125 N. Y. S. 865, 140 App. Div. 602.

Denied to correct illegal action of civil service commission. *Slavin v. McGuire*, 205 N. Y. S. 84, 98 N. E. 405, affirming 128 N. Y. S. 1046, 144 App. Div. 910.

Kingsley v. Pounds, 160 N. Y. S. 228, 96 Misc. Rep. 27, denying injunction to restrain issuing permit for removal of buildings.

Suit to restrain the municipality from enforcing the provisions of a statute relating to the employment of labor on public works alleged to be unconstitutional, at the instance of taxpayers, denied. *Lee v. Lynn*, 223 Mass. 109, 111 N. E. 700.

⁵⁴ *Maxwell v. Smith*, 87 Wash. 629, 152 Pac. 530, 531.

⁵⁵ *Butler v. Karb*, 96 Ohio 472, 117 N. E. 953, 955, quoting with approval from § 1799, vol. 4, ante.

⁵⁶ *Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276.

Suit to restrain city officers and

Injunction to restrain the sale of electrical appliances by a municipality which owned a plant and was furnishing electric light to the inhabitants at the instance of a taxpayer was denied where there was no showing made that taxation would be increased as a result or that any public funds were being misappropriated.⁵⁷

In Ohio the chief law officer of the municipality is authorized to maintain an action to prevent unjust discrimination in rates and service by the municipality in operating a public utility, as a light plant. In such proceeding he represents the public. If upon request of a taxpayer he refused to institute an action the taxpayer may do so who in that relation represents the public.⁵⁸

If a statute requires the price at which a street paving material shall be sold, as asphalt, which is manufactured

an electric light company from entering into a contract whereby the electric company would pump the water for the city waterworks system, on the ground it was a public improvement and therefore required estimate of the city engineer, was denied, the court holding that it was not a public improvement. *Arnhold v. Klug*, 97 Kan. 576, 155 Pac. 805.

⁵⁷The petition did not show that plaintiff had sustained or will suffer any loss or damage as a taxpayer by reason of the action complained of. Nor was there a showing of increase of taxation as a result. There was no allegation of an improper use of money raised by taxation for that purpose, etc. Whether this was as a whole profitable in operating the plant by reason of increased sale of electricity or otherwise was not shown in the petition. To entitle plaintiff to equitable relief as a taxpayer, present or prospective damages must be shown. Nor did

it appear that the implied discretionary powers in the operation of the plant by the municipality had been exceeded. *Andrews v. South Haven*, 187 Mich. 294, 153 N. W. 827, 830, 831.

⁵⁸If city fails to adopt a uniform system of rates for lighting to private consumers so that under like conditions the same rate is charged, but leave the matter to its officers, who without system arbitrarily fix rates, and in doing so unjustly discriminate, etc., equity will interfere. Discrimination was in furnishing current to private consumers, and in the rates and terms of such service. "That such discrimination constitutes an abuse of power there can be no longer question. That neither public nor private corporations may discriminate between members of the public with reference to rates and terms of service does not longer admit of controversy." *Butler v. Karb*, 96 Ohio 472, 117 N. E. 953, 956.

in the city, to be provided "by ordinance and not otherwise," a street official cannot fix the price, and hence, a taxpayer may maintain an action to enjoin the municipality and such officer from selling such article until the enactment of a price fixing ordinance.⁵⁹

§ 2591. Same—passage and enforcement of ordinances.⁶⁰

§ 2592. Same—acts relating to bonds.⁶¹

A resident taxpayer may invoke injunction to avert the issuance of municipal bonds for a purpose not authorized by law,⁶² or to prevent an unlawful bond issue,⁶³ as where the mandatory applicable legal provisions were

⁵⁹ *Shanstrom v. Case*, 103 Wash. 672, 175 Pac. 323.

⁶⁰ Granted to restrain carrying out a void ordinance accepting a gift to erect in a public park specified structures, where charter gave park board full control over public parks. *O'Melveny v. Griffith*, 178 Cal. 1, 171 Pac. 934. .

⁶¹ Denied against issuing improvement bonds. *Wickliffe v. Greenville*, 170 Ky. 528, 186 S. W. 476.

To restrain city from issuing bonds for lighting purposes. *O'Beirne v. Elgin*, 187 Ill. App. 581.

To restrain holding an election to determine the question of issuing bonds, denied. *Cohen v. Houston* (Tex. Civ. App.), 176 S. W. 809.

To enjoin issuance of bonds on invalid sewer construction contract. *Ward v. Kropf*, 207 N. Y. 467, 101 N. E. 469, affirming 127 N. Y. S. 1148, 143 App. Div. 919.

To enjoin issuance of corporate stock to pay bonds. *Schieffelin v. Hylan*, 176 N. Y. S. 809.

⁶² *Colvin v. Ward*, 189 Ala. 198, 66 So. 98; *Coleman v. Eutaw*, 157 Ala. 327, 47 So. 703.

Thus a resident taxpayer, although he has no special interest, may sue to restrain the issuance of bonds where it appears that the funds so raised will be devoted to illegal purposes, and to purpose not sanctioned by the electors when they voted to authorize the issue. *Afton v. Gill*, 57 Okl. 36, 156 Pac. 658.

⁶³ *Richardson v. McReynolds*, 114 Mo. 641, 21 S. W. 901.

Action by land owners and taxpayers in behalf of themselves and all other landowners and taxpayers of the town to enjoin the town from offering for sale or selling any bonds or exercising any of the powers conferred by particular legislative act, and from levying or collecting any tax on the real estate of the town for the payment of the principal of the bonds referred to in said legislative act or the interest thereon. *Weber v. Probey*, 125 Md. 544, 94 Atl. 162.

ignored,⁶⁴ or the debt limit would be exceeded by the contemplated bond issue.⁶⁵

Where bonds were in fact sold and delivered before the application for a temporary injunction was heard no injunction against their sale can be granted.⁶⁶

§ 2593. Same—making or performance of illegal contracts.⁶⁷

If no unreasonable delay or laches appears,⁶⁸ suits

⁶⁴ Injunction to restrain issuance of city bonds sustained for failure to observe mandatory provision as to the publication of the notice of the election where an election was a prerequisite to their issuance. *Miami v. Romfh*, 66 Fla. 280, 63 So. 440.

Injunction against issuing and selling improvement bonds on ground of certain irregularities and illegalities in the election when proposition to issue was submitted to the electors, denied. *Link v. Karb*, 89 Ohio 326, 104 N. E. 632.

A vacancy in a municipal council will not invalidate a vote of the council authorizing a bond issue if there are sufficient members of the council remaining in office who vote for and sanction such action to constitute a majority of the entire membership, and not merely a majority of a quorum and hence, an injunction brought at the instance of taxpayers to enjoin the bond issue cannot be sustained on the ground that the act was illegal. *Hartzler v. Goodland*, 97 Kan. 129, 154 Pac. 265, 267, citing § 593, and 594, vol. 2, ante.

⁶⁵ Debt limit provisions considered. *Patterson v. Edmonds*, 72 Wash. 88, 129 Pac. 895.

Injunction against issuance of storm and sanitary sewage bonds denied where all provisions of the law have been observed and the debt limit was not exceeded. *Phelps v. Lexington*, 167 Ky. 451, 180 S. W. 786.

Injunction denied against issuance of bonds for the construction, etc., of a system of waterworks on the ground that the matter was not submitted to the electors and also that their issuance would exceed the debt limit. *Bain v. Goldsboro*, 164 N. C. 102, 80 S. E. 256.

In an action to restrain the issuance of bonds on the ground that such act would be a violation of the debt limit, the burden is upon the complaining taxpayer to show the invalidity of the bond issue, and consequently each item of the existing indebtedness affecting the same. *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040, 1042; *Bradford v. Glasgow*, 143 Ky. 401, 13 S. W. 647; *Carter v. Krueger & Son*, 175 Ky. 399, 194 S. W. 553.

⁶⁶ *Simpson v. Nacogdoches* (Tex. Civ. App.), 152 S. W. 858.

⁶⁷ *Black v. New Orleans Ry. & Light Co.* (La. 1919), 82 So. 81.

To restrain illegal, unauthorized

by citizens and taxpayers, falling within the rules herein stated, are allowed to restrain the making and performance of void,⁶⁹ or ultra vires contracts by municipal

or fraudulent contract. *Corpus Christi v. Mireur* (Tex. Civ. App. 1919), 214 S. W. 528.

Injunction denied. *Monk v. Moultrie*, 145 Ga. 843, 90 S. E. 71.

Action to enjoin a city from carrying out a lighting contract with a lighting company denied for failure of petition to state a cause of action in certain respects, and omission to aver that the performance would result in an illegal dissipation of the public funds. *Rice v. Indianapolis*, 183 Ind. 203, 108 N. E. 584, 586.

Until liability has accrued on the contract or the city is about or threatening to make payments thereon, court will not restrain publication of resolution declaring necessity of making a named public improvement. *Pitser v. Pawnee* (Okl.), 149 Pac. 201.

⁶⁸ On ground that contract for municipal improvements exceeded the debt limit. Action denied where delayed until a portion of the money had been obtained and the balance had been agreed to be loaned and much of it had been expended. The rule of laches applies in actions of this character. *Chew v. Philadelphia*, 257 Pa. 589, 101 Atl. 915.

Laches as a defense should be pleaded. *Ayers v. Jacksonville*, 171 Ill. App. 129.

⁶⁹ *Konig v. Baltimore*, 126 Md. 606, 95 Atl. 478.

Injunction denied sought on ground contract was void because

of the alleged interest of the mayor and a councilman. *O'Neill v. Auburn*, 76 Wash. 207, 135 Pac. 1000.

To restrain a city from carrying out a contract because void in that it created a debt without the consent of the electors expressed by ballot, etc. *Renfroe v. Atlanta*, 140 Ga. 81, 78 S. E. 449, 45 L. R. A. (N. S.) 1173.

To restrain school commissioner from entering into contract, for installing a system of ventilation, etc., in certain school buildings. *McBride v. Ashley*, 154 N. Y. S. 1010, 91 Misc. Rep. 585.

To restrain carrying out alleged unlawful contracts between railroad companies and a state terminal station commission. *McCutcheon v. Buffalo Terminal Station Com.*, 217 N. Y. 127, 111 N. E. 661, affirming 154 N. Y. S. 711, 68 App. Div. 301, which affirmed 150 N. Y. S. 850, 88 Misc. Rep. 148.

Equity may enjoin entering into a void contract requiring making local assessments, notwithstanding under the law, landowners may appear at the hearing and present objections. *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374.

To enjoin from selling asphalt manufactured at city plant until ordinance has been enacted fixing price, as required by charter. *Shanstrom v. Case* (Or. 1918), 175 Pac. 323.

To enjoin making contracts where there has not been a strict

officers, in order to prevent waste or unlawful diversion of public funds.⁷⁰

But if power to make the given contract exists, in

adherence to the law applicable. *Flinn v. Philadelphia*, 259 Pa. 355, 102 Atl. 24.

To prevent carrying out contract as to municipal electric lighting plant and a system of street lighting. "Taxpayer may maintain a bill to enjoin the letting of an illegal contract, or the extension of an illegal tax, irrespective of the question whether he could also successfully defend against the collection of the tax levied upon his property. The authorities are too numerous on this subject to require extensive citation or discussion of the reasons supporting them." *O'Beirne v. Elgin*, 187 Ill. App. 581, 588.

Where the violation of the municipal charter in making a contract beneficial to the city was of a character which indicated an honest mistake and not intentional, a court of equity ought not to be required to deal with such a case precisely as it would with one where there was a deliberate and wholly inexcusable violation of law, especially if the latter showed fraud, collusion or unjust treatment of others. If such contract has been completed, of course, it would be useless to issue an injunction to restrain its execution, and where it appears that no public benefit would result from an injunction it will be denied. Here no actual damage was shown to any of the taxpayers. The violation was at most merely technical. The purpose of such in-

junctions is to protect the public interest. *Konig v. Baltimore*, 128 Md. 465, 97 Atl. 837.

⁷⁰ Even if not satisfied taxpayer is acting in good faith court will grant relief if officers acted ultra vires. *Konig v. Baltimore*, 128 Md. 465, 97 Atl. 837, 441.

To restrain city and telephone company from entering into a contemplated contract for the construction and operation of a telephone system within the city. *Arpin v. Thief River Falls*, 122 Minn. 34, 141 N. W. 833.

To restrain municipality from carrying out a contract between it and the county wherein the county agreed to furnish cement to the city which contract was ultra vires and void so far as the county was concerned. *Riverside Portland Cement Co. v. Los Angeles*, 178 Cal. 609, 174 Pac. 31.

To restrain city from entering into a contract for the construction and operation of a railroad running out of the city and from issuing bonds for the purpose of constructing the same, denied. *Pearce v. Roseburg*, 77 Or. 195, 150 Pac. 855.

Action by citizen and taxpayer, to set aside and enjoin the carrying out of a contract by a town and a traction company to supply the town with electric current for the purpose of street lighting, and to compel by mandatory injunction the town to proceed with the construction of an electric light plant, pursuant to action taken by

the absence of arbitrary, corrupt or fraudulent action, here as in the exercise of equitable jurisdiction in other matters, the discretion vested in municipal officers as to the making and performance of contracts will not be disturbed at the instance of citizens and taxpayers.⁷¹

§ 2594. Same—letting of contracts where competitive bids required.⁷²

§ 2595. Same—incurring indebtedness above debt limit.⁷³

§ 2596. Same—unlawful expenditure or diversion of funds.⁷⁴

A taxpayer has sufficient interest to restrain the city

resolution of the legislative body and vote of the electors, which included a bond issue. In overruling demurrer to petition, the court ruled that the town had ample power to supply lighting, etc. *Cooper v. Middleton*, 56 Ind. App. 374, 105 N. E. 393, 394, 395, citing §§ 1779, and 1783, vol. 4, ante.

⁷¹ Injunction to restrain entering into street paving contract denied. "The law in this state is well settled that the court cannot interfere, in the absence of fraud, with the exercise of the official discretion," in awarding contracts for street paving. *Hallet v. Elgin*, 254 Ill. 343, 98 N. E. 530.

⁷² *West v. Oakland*, 30 Cal. App. 556, 159 Pac. 202; *Ayers v. Jacksonville*, 171 Ill. App. 129; *Perew v. North Tonawonda*, 147 N. Y. S. 678, 84 Misc. Rep. 494; *Price v. Fargo*, 24 N. D. 440, 139 N. W. 1054, 1058 (citing § 1186, p. 2634, vol. 3, ante); *Flinn v. Philadelphia*, 259 Pa. 355, 102 Atl. 24; *Ganten-*

bein v. Pasco, 71 Wash. 635, 129 Pac. 374.

Discretion in letting contract to "lowest responsible bidder," will not be set aside by court unless arbitrary, oppressive or fraudulent. *Williams v. Topeka*, 85 Kan. 857, 118 Pac. 864.

Burden is on taxpayer to show that award of contract was illegal. *Shields v. Seattle*, 79 Wash. 308, 140 Pac. 353.

⁷³ *Dunham v. Slidell*, 139 La. 933, 72 So. 465; *West Covington v. Dods*, 152 Ky. 617, 153 S. W. 964; *Schieffelin v. Hylan*, 174 N. Y. S. 506.

Burden on complaining taxpayer to prove exceeding of debt limit. *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040, 1042; *Winchester v. Winchester Waterworks*, 149 Ky. 177, 148 S. W. 1, Ann. Cas. 1914A, 1258.

⁷⁴ *Osburn v. Stone*, 170 Cal. 480, 150 Pac. 367; *Schieffelin v. Craig*, 170 N. Y. S. 603; *Tietz v. Williams*, 155 N. Y. S. 612, 91 Misc.

from making unlawful use of its public funds,⁷⁵ as paying salaries not authorized by law,⁷⁶ or without an appropriation therefor.⁷⁷

Rep. 623; *Burns v. Nashville* (Tenn. 1920), 221 S. W. 828.

Under New York statute. *Hicks v. Cocks*, 153 N. Y. S. 776, 167 App. Div. 862.

To prevent waste of city funds authorized. *Klinck v. Pounds*, 163 N. Y. S. 1008.

Injunction to require enforcement of a rule of the board of education relating to the disbursement of public school funds. *People v. Chicago*, 199 Ill. App. 356.

⁷⁵ *McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99.

To restrain the creation or payment of illegal debts. The plaintiff "is a taxpayer of the city, and as such has an interest in the funds arising from municipal taxation. If such funds are being used, or about to be used, for the purpose of paying an illegal debt created by the corporation or an illegal contract has been executed by the corporation which would eventuate in payments under the illegal contract by the corporation, then the plaintiff would have such interest in the subject matter of the suit, having for its purpose the cancelling of the contract and the enjoining of payment of money pursuant thereto, as to authorize him to bring and maintain the action." *Brunby v. Marietta Board of Lights & Waterworks*, 147 Ga. 592, 95 S. E. 7, 9; *Renfroe v. Atlanta*, 140 Ga. 81, 78, S. E. 449, 45 L. R. A. (N. S.), 1173.

Action by resident taxpayer to restrain a municipality from pay-

ing a fee to an attorney alleged to be illegal. In such case the attorney involved may intervene. *Schurtz v. Grand Rapids*, 199 Mich. 20, 165 N. W. 766.

Unlawful expenditure of public money, or the incurring of an obligation rendering such expenditure necessary. *Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276.

To prevent transferring funds of the municipality to a private institution. *Le Bourgeois v. New Orleans* (La. 1919), 82 So. 268.

⁷⁶ *Johnson v. Milwaukee*, 147 Wis. 476, 133 N. W. 627.

To enjoin the payment of the salary of one appointed as plumbing inspector who had not obtained as expressly required by law, a certificate of competency from the examining board. *Gregory v. Simpson*, 159 N. Y. S. 1016, 173 App. Div. 6.

Action to restrain payment to one illegally appointed to a public place, as a woman, not a citizen of the state to the position of nurse in the department of health, where the law forbade the employment of non-residents of the state. *Hellyer v. Prendergast*, 162 N. Y. S. 788, 176 App. Div. 383.

⁷⁷ Taxpayers may restrain a municipality from making payment of salaries for services rendered to it without an appropriation for the payment of such salaries. The court said that the proposition was too well settled to admit of argument. *Thiel v. Philadelphia*, 245 Pa. 406, 91 Atl. 490.

But expenditures of public moneys for lawful purposes, as obligations against the municipality justly due,⁷⁸ or salaries of officers legally payable,⁷⁹ or expenditures more or less within the discretion of appropriate municipal officers, will not be enjoined at the suit of taxpayers.⁸⁰

Acts in excess of legal authority and which require the expenditure of public money may be enjoined.⁸¹

⁷⁸ Where a town has no defense against an account there is no equity in a taxpayer's bill to enjoin its payment. *Fahey v. Bloomington*, 268 Ill. 386, 109 N. E. 292.

⁷⁹ A taxpayer cannot secure the aid of equity to prevent de facto officers from serving and receiving compensation. *Uhr v. Brown* (Tex. Civ. App.), 191 S. W. 379, 384.

Action to restrain payment of salary, because (1) the officer, here the corporation counsel, was allowed to fix the salary of his own assistants, in violation of the city charter, which was a delegation of the power of the city council, and (2) the officer had failed to take the oath of office. To sustain the action, the court said some injury must be shown. "No instance has been called to our attention, and a search of the authorities has failed to disclose a case where an injunction has been allowed a taxpayer who did not show that the illegal act sought to be restrained would result in damage to the public." Provision as to oath is only directory and failure to take does not work forfeiture of office. *Maxwell v. Smith*, 87 Wash. 629, 152 Pac. 530.

⁸⁰ Expenditure of public money to safeguard public property is

justified and will not be enjoined on the ground that it is a dissipation of public funds. *Williams v. Baltimore*, 128 Md. 140, 97 Atl. 140.

To restrain opening street and the payment to property owner of sum for such opening over his property. "Under some circumstances a village council may lawfully pay money to a property owner for the opening of a street across his property. Proposed municipal action of this or any other sort will not be restrained unless facts are alleged which show the action to be unlawful. Vague allegation that the expenditure is an unwarranted waste of funds without setting forth any action on which the court can form a judgment, do not furnish a basis for an injunction." *Tiedt v. Argyle*, 129 Minn. 259, 152 N. W. 412.

Exercise of powers irregularly or defectively by municipal authorities resulting in the municipality obtaining and enjoying property. Allowance of claim for, by the municipality will not be disturbed in a taxpayer's action. *Stickel Lumber Co. v. Kearney* (Neb. 1919), 173 N. W. 595.

⁸¹ *Green v. State Civil Service Com.*, 90 Ohio 252, 107 N. E. 531, 532.

Any election held under an un-

At an election the voters favored the sale of liquor in the community and thereupon the municipal authorities granted licenses for such sale, and subsequently upon contest the Supreme Court held invalid the election. In such circumstance a taxpayer's action, it was held, will not lie to prevent the municipality from refunding the prorata portion of the license tax paid to cover the term unexpired.⁸²

§ 2597. Same—levy and collection of taxes.⁸³

constitutional law would be a nullity and the expenditure of public funds for that purpose would be unlawful and taxpayers may enjoin the holding of such election. Where taxpayers sought to enjoin the holding of an election to have the electors determine whether pool rooms should be operated or forbidden under a law which the court held constitutional their application will be dismissed. *Roper & Gilley v. Lumpkins* (Tex. Civ. App.), 163 S. W. 110.

⁸² "In this action taxpayers are seeking to take advantage of payments that were made under an honest mutual mistake as to the validity of the election—are seeking to keep from these licensees that which in honesty and good conscience belongs to them. Our attention has been called to no statute forbidding the city from returning this money, and there are certainly no reasons which would appeal to a court of equity as warranting it to restrain the city from doing this act of common honesty and justice." *Ege v. Williams*, 38 S. D. 50, 159 N. W. 898.

⁸³ *Blalock v. Jonesboro*, 147 Ga. 485, 94 S. E. 567.

To restrain altering grade of street at expense of city thereby casting upon the taxpayers additional burdens. *Shackleford v. Jefferson City*, 167 Mo. App. 59, 62, 150 S. W. 1123.

Taxpayers' action to restrain city from collecting a special tax to support a fire department. *Caland v. Springfield*, 264 Mo. 296, 174 S. W. 396.

A taxpayer may maintain injunction restraining a municipality from making a street improvement, where he will be assessed for such improvement as a property owner, if the ordinance is void, because it authorized the issuance of bonds made payable beyond the time allowed by the applicable statute. He sustains his right to maintain the bill when he shows that the improvement is not made in pursuance of an ordinance passed in conformity with the statute authorizing it. Municipal improvements are regulated entirely by statute to which the rule of strict construction applies. The provisions of the statute were disregarded in the ordinance authorizing the improvement. *McAndrew v. Dunmore Borough*, 245 Pa. 101, 91 Atl. 237.

§ 2599. Same—collection of judgment.⁸⁴**§ 2600. Same—misuse of municipal property.⁸⁵**

⁸⁴ Taxpayers suing to enjoin the collection of a judgment on a contract where the petition does not allege that the acts of the municipal officers were fraudulent or collusive leaves merely the question of the legality of the contract and the contractor's claims. The injunction was sought on the ground of failure to appeal from the judgment by the municipality, and the petition alleged that such failure was an illegal official act, that the judgment is illegal and is based upon fraudulent, unjust, inequitable and illegal claims, and unless restrained the funds of the municipality will be wrongfully diverted and wasted and that the property of the taxpayers suing will be subjected to additional and illegal taxation. A demurrer to the petition was sustained on the ground that it failed to state a cause of action. "The plaintiffs ask a court of equity not only to intervene but to do so after the contractor has pursued his remedy in a court of law and has recovered a judgment. The relief asked would not only deprive him of this judgment, but would take away from Kelly (contractor) and from the village the constitutional right to have the matter determined by a common law court and a trial by the country. In such forum a defendant's position is so strong that a contractor cannot recover unless he shows substantial compliance in every particular with the conditions of his contract. A court of equity has no

such prerogative, even before the cause of action has been merged in a judgment. The framers of this statute did not intend to give a referendum to the courts when called on by a minority of a municipal board. The judgment against the village imports verity, and the trustees (though by a narrow majority) have voted against the expense and delay of an appeal. The safe and constitutional road of progress is to impress on the people that only in rare cases would the court step in to set aside the action of the governing body after the municipality has been held liable in the proper forum. The people have confided to their elected officials a wide range of authority in the use of which they are answerable to their constituents. In the exercise of these powers the local authorities are beyond the direction and control of the courts. If they should make mistakes they must be temporary, compared with the mischief which judicial supervision in all cases would ultimately produce. Our powers cannot be extended to reach and review this action of the constituted village officials on the grounds here set forth." *Childs v. Tompkins*, 168 N. Y. S. 174, 180 App. Div. 855.

⁸⁵ Injunction to restrain illegal disposition of public property. *Spurrier v. Vater*, 62 Ind. App. 669, 113 N. E. 732.

To enjoin removal of school house to new site. *Williams v.*

§ 2601. Demand before suit.^{85a}**§ 2602. Parties, pleading and proof.⁸⁶**

In an action by a taxpayer on behalf of a city to recover

School District, 167 Mo. App. 476, 151 S. W. 506.

Diversion of park to private use will be enjoined. *Sharp v. Guthrie* (Okl. 1914), 145 Pac. 764.

To set aside unlawful conveyance by city of property dedicated to public use by city will lie. *Philadelphia Museum Trustees v. Pennsylvania University Trustees*, 251 Pa. 115, 96 Atl. 123.

In an action by a citizen and taxpayer to enjoin the municipality from leasing an auditorium in a municipal building owned by the city and to restrain one from conducting moving picture shows therein, the court said: "The doctrine appears to be well settled that a taxpayer cannot invoke the restraining power of a court of equity in matters of this character unless it is shown that the municipal corporations and its officers are acting ultra vires, and where such unauthorized acts may affect injuriously the rights of the parties complaining. * * *

The inquiry is one of power. Had the city the right to lease the auditorium as it did? True it would have no right to erect buildings primarily to rent, but if in erecting a building for its municipal affairs, an auditorium was included in the structure intended and designed for public gatherings and subsequently conditions became such that the same was no longer needed for the purposes or

use of the municipality, and that by leasing the same a better income would be derived and the burden of taxation lightened, we see no sound reason why it may not legally do so." *Anderson v. Montevideo*, 137 Minn. 179, 162 N. W. 1073, distinguishing *Nerlein v. Brooten*, 94 Minn. 361, 102 N. W. 867.

^{85a} *Burns v. Nashville* (Tenn. 1920), 221 S. W. 828, 837, citing § 2601, vol. 5, ante.

⁸⁶ **Parties.** Sureties of municipal officers authorizing illegal payment of money of the city are not proper parties in a suit by a taxpayer to recover such money under the Oklahoma statute, since they are not liable on the official bonds to such suing taxpayer. *State ex rel. v. Muskogee* (Okl.), 172 Pac. 796.

Petition under Oklahoma statute in the name of the state at the relation of a resident taxpayer against a municipality to recover unlawful payment of money to a railroad company to keep its shops in the city. *State ex rel. v. Muskogee* (Okl.), 172 Pac. 796.

Parties complainants in action by state's attorney on the relation of a taxpayer and elector of a municipality to prevent the enforcement of a rule of the board of education prohibiting teachers in public schools from belonging to certain societies or unions. *People v. Chicago*, 199 Ill. App. 356.

money illegally expended the city should be made a party defendant.⁸⁷

And the municipality was held a necessary party defendant where the action was brought against the individuals occupying the offices of mayor and councilmen, the clerk and treasurer.⁸⁸

The New York statute authorizing taxpayers' actions has no requirement to join the municipality. "The act was to enable the taxpayer, himself to assert the rights of the municipality by clothing the individual taxpayer with such a representative power. In favor of such a remedy against a use of public money contended to be illegal, a somewhat liberal construction should be given.

* * * No doubt the town may voluntarily come in and make itself a party." Beneficiaries of alleged illegal payments need not be made parties. "This is not an action to cancel a contract, or to annul any rights of third persons. Indeed, a finding in favor of the plaintiff may not affect the rights of these payees. The policy of this legislation is to let a taxpayer squarely test the legality of such official acts, without having that issue clouded by complications arising from remedies as against third parties."⁸⁹

In taxpayer's action, other citizens and taxpayers are often allowed upon application to be made parties defendant.⁹⁰

Thus in a taxpayer's action to restrain municipal officers from performing specified duties required by a legislative act applicable to the municipality, and which is about to go into effect, on the ground that such act is unconstitutional and void, other citizens and taxpayers may be admitted as parties and defend.⁹¹

⁸⁷ Osburn v. Stone, 170 Cal. 480, 150 Pac. 367.

⁸⁸ Saunders v. Rainey, 141 Ga. 77, 80 S. E. 305.

⁸⁹ Hicks v. Cocks, 153 N. Y. S. 776, 167 App. Div. 862.

⁹⁰ Blalock v. Jonesboro, 147 Ga. 485, 94 S. E. 567.

Statutes provide that "all persons interested in litigation should be parties to proceedings for equitable relief," with certain exceptions. Allen v. Mitchell, 143 Ga. 476, 85 S. E. 336.

⁹¹ Anderson v. Bowen, 77 W. Va. 89, 87 S. E. 186.

In an action by a resident taxpayer to restrain a municipality from paying an alleged illegal attorney's fee, the attorney in question may be allowed to intervene and be heard in the case.⁹²

In a suit by a taxpayer relating to a railway franchise, ordinarily the railway company need not be made a party. The general rule is that although certain persons may have an interest in the subject-matter in litigation if the decree will not affect them and cut off any of their rights they are not necessary parties.⁹³

Pleading. The petition or complaint must affirmatively disclose that the complainants are taxpayers.⁹⁴

In an action to enjoin the carrying out of a lighting contract, as a taxpayer has no interest in the contract except so far as its performance will affect the public treasury of the city, if he fails to aver that any of the public funds are in danger of being illegally dissipated, he fails to state a cause of action.⁹⁵

Under the New York statute a complaint to restrain the alleged misappropriation of public funds by municipal officers, which charges that various sums were misappropriated and illegally paid with knowledge that the same were without warrant of law, is sufficient without the averment, in the words of the code, that such misappropriations were "waste of, or injury to," the funds of the municipality which would be merely a pleader's conclusion of law.⁹⁶

⁹² *Schurtz v. Grand Rapids*, 199 Mich. 20, 165 N. W. 766.

⁹³ *Reed v. Wing*, 168 Cal. 706, 144 Pac. 964.

⁹⁴ *Michigan City v. Marwick* (Ind. App.), 116 N. E. 434, 436, citing § 2585, vol. 5, ante.

⁹⁵ *Rice v. Indianapolis*, 183 Ind. 203, 108 N. E. 584, 586.

Injury to the public. *Maxwell v. Smith*, 87 Wash. 629, 152 Pac. 530.

⁹⁶ *Hicks v. Cocks*, 153 N. Y. S. 776, 167 App. Div. 862.

Injunction will not lie under the New York statute without an allegation that the contemplated act would be illegal, or of claim of fraud, corruption or wrongdoing. "Without such allegation and proof there is no basis for a taxpayer's action." *Kingsley v. Pounds*, 160 N. Y. S. 228, 230, 96 Misc. Rep. 27; *Rogers v. O'Brien*, 153 N. Y. 357, 47 N. E. 456; *Talcott v. Buffalo*, 125 N. Y. 280, 288, 26 N. E. 263.

Under the Montana statute a complaint by a resident taxpayer to restrain physical examination of the members of a police force pursuant to a council resolution which failed to allege that complainant was a member of such force or that he as such taxpayer would be injured as a result of the test, was held insufficient to state a cause of action. Under the statute special injury to himself is essential to entitle him to an injunction.⁹⁷

Where no injunction is sought, except upon full and final consideration, before which time the pertinent facts will have been fully attested by the formal introduction of sworn evidence, or by agreement as to the facts, the want of a preliminary affidavit when the petition is filed is immaterial. In brief, "it is the injunction and not the petition which needs the support of sworn testimony to justify it."⁹⁸

Proof. In a taxpayer's action to have declared void a contract as exceeding revenues, etc., where it was not alleged that there was fraud, unfairness, error or exaggeration committed in the budget or estimate of the excess of revenues over the statutory, necessary and usual charges for the year, evidence offered for the purpose of showing that the estimate of the revenues, was not fair and reasonable is inadmissible.⁹⁹

§ 2603. Judgment.¹

Expert accountants under the procurement of a citizens' committee, for examination of the books and records

⁹⁷ Larkin v. Butte, 52 Mont. 410, 158 Pac. 316.

⁹⁸ Hartzler v. Goodland, 97 Kan. 129, 154 Pac. 265.

⁹⁹ Roth v. Thibodaux, 137 La. 210, 68 So. 412, 414.

¹ Arkansas, in suit by a taxpayer to restrain a bond issue by an improvement district, the chancellor has no jurisdiction to determine the property to be em-

braced in such district, since this is for the property owners to determine. Riddle v. Ballew, 130 Ark. 161, 197 S. W. 27.

Particular judgment, it was held, "should be so construed and restrained as not to go further than the proper scope of a taxpayer's action and to restrain enforcement of special assessments against the property of the persons before the

of a municipality resulting in the restoration to the city of a large amount of public funds, which but for their action would have been lost to the public, cannot recover from the municipality, it has been held, the reasonable value of their services, on the theory of subrogation, namely, that the citizens and taxpayers are entitled to recover from the city their reasonable costs and expenses of such investigation, including a reasonable sum for the work of the expert accountants, and the expert accountants having performed the work are entitled to be subrogated to the rights of such citizens and taxpayers. The court stated, however, that under the facts such citizens and taxpayers were entitled to recover from the city the reasonable expense of such investigation, including any reasonable amount paid by them to the expert accountants for services in conducting such investigation.²

court and complaining." Sales v. ²Michigan City v. Marwick
Hartford, 161 Wis. 136, 152 N. W. (Ind. App.), 116 N. E. 434, 437-439.
853, 856.

CHAPTER 53.

MUNICIPAL LIABILITY FOR TORTS.

- I. LIABILITY IN GENERAL.
- II. GOVERNMENTAL VS. CORPORATE FUNCTIONS.
- III. RESPONDEAT SUPERIOR.
- IV. LIABILITY FOR ACTS OF PARTICULAR OFFICERS.
- V. PROPERTY OWNED BY MUNICIPALITY.
- VI. SEWERS, DRAINS, WATERCOURSES, AND SURFACE WATERS.
- VII. NOTICE OF THE "ACCIDENT."

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| § 2605. Liability of quasi-municipal corporation. | § 2618. Municipal liability for death. |
| § 2615. Actions by and over by municipality. | § 2620. Who may sue—employees of municipality. |
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IV. LIABILITY FOR ACTS OF PARTICULAR OFFICERS.

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| § 2718. Same—sufficiency of notice. | |

I. LIABILITY IN GENERAL.

§ 2604. Liability ex delicto recognized.¹

The law is well settled that a municipal, like a private corporation, or a natural person may be sued for tort.²

The liabilities of a municipal corporation are an incident to, and grow out of, the powers and duties conferred or exacted. It follows that if the corporation in the exercise of any of its powers or the performance of any of its duties, incurs in contractu or in delicto any liability, whether it arises from express legislation or

¹ Myrtle Point Transportation Company v. Port of Coquille River, 86 Or. 311, 168 Pac. 625.

² Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057.

Statutes recognize liability for damages for injuries to real or per-

sonal property due to the negligence of, or by the creation or maintenance of a nuisance by, a municipality. Meruk v. New York, 223 N. Y. 271, 119 N. E. 571.

by implication, it cannot escape such liability unless relieved therefrom by some valid provision of law. An exemption from a recognized liability cannot be claimed unless expressly given—certainly in a doubtful case a claim of exemption should be resolved against the corporation.³

A charter provision declaring that the city shall not be liable for the misfeasance or nonfeasance of its officers was held not violative of a provision of the constitution that the right of action to recover damages for injuries shall never be abrogated.⁴

Laws often limit the liability of municipalities for damages for injuries done or suffered. Thus the statute of Alabama restricts such actions to two distinct cases of negligent misconduct or omission, namely (1) where the wrong done or suffered was the proximate result of culpable act of omission of some agent, officer or employee then engaged within the line of his duty in the municipal service; and (2) where the wrong done or suffered was the proximate result of culpable municipal omission "to remedy some defect in the streets, alleys, public ways, or buildings after the same (i. e., defect as defined) has been called to the attention of the coun-

³ *Schultz v. Phoenix*, 18 Ariz. 35, 156 Pac. 75.

City was exempted from liability for personal injuries resulting from the negligence of its officers and agents. *Fifield v. Phoenix*, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430; *Morell v. Phoenix*, 16 Ariz. 511, 147 Pac. 732.

"Where a municipality (whether a governmental agency or a body corporate), with the sanction of the state, has assumed the performance of a work or industry or enterprise formerly carried on by the citizenship, that of itself, so far as its practical operation is concerned, stamps it as a cor-

porate or ministerial work." *Fowler v. Cleveland* (Ohio 1919), 126 N. E. 72, 76.

⁴ Such constitutional provision only undertakes to preserve rights already cognizable by law, and does not undertake to create new rights of action. "When the constitution was adopted the charter of defendant city was in force and effect as a law of the territory, and was carried forward as a law of the state, were not repugnant to the constitution, and by that law the defendant city is exempt from liability for the injury complained of." *Morell v. Phoenix*, 16 Ariz. 511, 147 Pac. 732, 735.

cil, or after the same (i. e., defect as defined) has been left for such unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the council.”

In the first class are wrongs or injuries resulting from negligence of agents, etc., of the municipality, consistent with the doctrine of *respondeat superior*; and in the second class are wrongs or injuries for which the municipalities are only liable for culpable neglect to remedy a condition negligently created, or where they are allowed to exist by a person or corporation not related in the service of the municipality—a stranger to the municipal service or functions.⁵

Laws frequently expressly provide for actions in specified cases against municipal corporations. Thus the statute of South Carolina allows an action to any person who shall receive damages in his person or property (1) through a defect in any street (2) or by reason of defect or mismanagement of anything under the control of the corporation.⁶

§ 2605. Liability of quasi-municipal corporations.

In Illinois, it was established at an early day that a private action will not lie against a county for injuries occasioned by the negligence of its servants or officers in the performance or nonperformance of their duties, or in the performance of their duties in a negligent manner, unless expressly so provided by statute.⁷ In Maine, towns which are merely subdivisions of the state, are not in general liable for the default or negligence of their agents and servants in the performance of municipal or public duties which they perform as agents of the state, unless the liability is created by statute.⁸

⁵ *Birmingham v. Carle*, 191 Ala. 539, 68 So. 22, L. R. A. 1915F, 797.

⁶ *Burnett v. Greenville*, 106 S. C. 255, 91 S. W. 203.

⁷ *Jennings v. Peoria County*, 196 Ill. App. 195; *Hollenbeck v.*

Winnebago County, 95 Ill. 148.

⁸ *Dyer v. South Portland*, 111 Me. 119, 88 Atl. 398.

Counties are only liable for defects in the highways when and to the extent that they are made

§ 2615. Actions by and over by municipality.⁹**§ 2616. Negligence as basis of recovery.¹⁰**

If the injury was not caused by any direct act or omission of the municipality, and which was not the result of negligence in any respect but was merely the result of natural conditions no liability can arise.¹¹

Statutes or charters frequently provide that no municipal liability can arise unless the injury or wrong resulting in damages, was done or suffered through the neglect, carelessness or unskillfulness of some agent, officer or employee of the municipality engaged in work therefor and while acting in the line of his duty.¹² As the gist of the action is negligence, it is essential to allege ultimate facts showing the relation out of which arose the duty of the municipality to exercise appropriate care with reference to the rights of the plaintiff,

so by statute. *Montgomery v. Ross*, 195 Ala. 362, 70 So. 634.

"The power and authority which the county exercises in reference to roads and bridges in its character and nature is governmental rather than corporate; and upon principles of the common law a county cannot be made answerable to private individuals for injuries resulting from the failure to exercise the power in the manner most conducive to the public safety. In this respect counties are distinguished from towns, cities and other municipal corporations charged with the duty of keeping streets and other highways in safe and suitable condition for passage." *Montgomery v. Ross*, 195 Ala. 362, 70 So. 634.

⁹ *Madden v. Delaware L. & W. R. Co.*, 234 Fed. 731, 738, 739, affirmed 241 Fed. 808, 154 C. C. A. 510; *Waterbury v. Clark*, 91 Conn.

254, 99 Atl. 578; *Louisville v. Metropolitan Realty Co.*, 168 Ky. 204, 182 S. W. 172; *Mooney v. Hauck*, 1 Ohio App. 432, 35 Ohio Cir. Ct. R. 134; *Seattle v. Shorrock*, 100 Wash. 234, 170 Pac. 590; *Seattle v. Peterson & Co.*, 99 Wash. 533, 170 Pac. 140; *Topeka v. Central Sash & Door Co.*, 97 Kan. 49, 154 Pac. 232; *Baille v. Wallace*, 24 Idaho 706, 135 Pac. 850; *Kinloch Telephone Co. v. St. Louis*, 268 Mo. 485, 497, 188 S. W. 182.

¹⁰ *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N. E. 387; *Vitucci Importing Co. v. Seattle*, 72 Wash. 192, 130 Pac. 109.

¹¹ *Yakima Central Heating Co. v. North Yakima*, 86 Wash. 99, 149 Pac. 341.

¹² *Bessemer v. Whaley*, 8 Ala. App. 523, 62 So. 473; *Birmingham v. Carle*, 191 Ala. 539, 68 So. 22, L. R. A. 1915F, 797.

and also the negligent act of omission or commission for which the city or town is liable, that proximately caused the injury complained of.¹³

§ 2618. Municipal liability for death.¹⁴

An action to recover damages for death must be prosecuted in the manner and under the condition specified by the statute.¹⁵

§ 2620. Who may sue—employees of municipality.¹⁶

Where a municipality is exercising an administrative function at the time an employee is injured, it owes its employee the duty of a safe place to work; and for a failure to do so, and where by reason of such failure an employee is injured without fault on his part, the corporation would be liable under the same circumstances that a private individual or corporation would be.¹⁷

And it has been held that a municipality engaged in constructing a sewer is bound to the same rule of dili-

¹³ *De Funiak Springs v. Perdue*, 69 Fla. 326, 68 So. 234; *Gonzalez v. Pensacola*, 65 Fla. 241, 61 So. 503.

¹⁴ *Higginbotham v. Rome* (Ga. App. 1919), 100 S. E. 720; *Frohs v. Dubuque*, 169 Ia. 431, 150 N. W. 62; *Fowler v. Cleveland* (Ohio 1919), 126 N. E. 72.

¹⁵ *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664.

¹⁶ *Hanrahan v. Chicago* (Ill.), 124 N. E. 547; *Ardmore v. Fowler* (Okl.), 153 Pac. 1117; *District of Columbia v. Wood*, 41 App. D. C. 101; *Jourdan v. La Grange*, 55 Ind. App. 502, 104 N. E. 104; *Kokomo v. Loy*, 185 Ind. 18, 112 N. E. 994; *Henry v. Lincoln*, 93 Neb. 331, 140 N. W. 664; *Schultz v. St. Paul*, 124 Minn. 257, 144 N. W. 955; *Riley v. Independence*, 258 Mo.

671, 167 S. W. 1022; *De Moll v. New York*, 148 N. Y. S. 966, 163 App. Div. 676; *Durant v. Allen* (Okl.), 168 Pac. 205; *Mackay v. Port of Toledo*, 77 Or. 611, 152 Pac. 250; *Greenville v. Branch* (Tex. Civ. App.), 152 S. W. 478.

Statute construed. *Fontz v. Los Angeles*, 167 Cal. 487, 140 Pac. 20.

A statute authorizing action for a defective street by "any person who shall receive bodily injury or damage," etc., was held to include a city employee. *Strait v. Rock Hill*, 104 S. C. 116, 88 S. E. 469.

¹⁷ *Savannah v. Jordan*, 142 Ga. 409, 83 S. E. 109, L. R. A. 1915C, 741, Ann. Cas. 1916C, 240; *Bruhnke v. LaCrosse*, 155 Wis. 485, 144 N. W. 1100, 50 L. R. A. (N. S.) 1148.

gence in providing a safe place for its employees to work which applies to a private or independent contractor engaged in a similar work.¹⁸

§ 2621. Personal liability of officers for torts.¹⁹

In an Oregon case, the charter imposed the duty upon abutting land owners to construct sidewalks. The charter also relieved the municipality from liability to persons for defective sidewalks. These provisions were held not to relieve abutting owners and municipal officers, if they should be negligent, from liability.²⁰

¹⁸ *Atlanta v. Trussell*, 21 Ga. App. 340, 94 S. E. 649, 653.

¹⁹ *State ex rel. v. Harper*, 166 Wis. 303, 165 N. W. 281, 285.

By statute. *Mackay v. Port of Toledo*, 77 Or. 611, 152 Pac. 250.

The exercise of the power to grant or refuse a license to erect a building is a governmental function, but if the officials charged with the exercise of the duty should have corruptly or oppressively refused the license asked an action might have been laid against them individually, but there is no such allegation in the pleadings. *Clinard v. Wistom-Salem*, 173 N. C. 356, 91 S. E. 1039.

²⁰ "In the case at bar the charter has not authorized the city to construct sidewalks; that duty is expressly imposed upon the abutting property owner. The council may direct him to make the improvement and prescribe the plan upon which it shall be made, but the duty to build the walk in the first instance and to keep it in repair thereafter is primarily upon the property owner. It is true that if the property owner fails

to keep a walk in repair, the law requires the city engineer after notice to the owner to make such repairs at his final expense; but after all it is the owner who is primarily the person to make the repairs. There is justice under such circumstances in requiring the owner to be responsible for any damage which may ensue by reason of his neglect. If the city engineer fails to give the notice required, or if in default of the owner making repairs, he or the council with knowledge of such default allows the defective condition to continue, there is justice in requiring these delinquent officers and the owner to answer for such delinquency instead of saddling it upon the general taxpayers. There is respectable authority for the proposition that the legislature may entirely absolve a city from liability for injuries arising by reason of defective streets or sidewalks, and that such legislation is not in derogation of a constitutional provision similar to § 10 article 10, of our constitution. (*Goddard v. Lincoln*, 69 Neb. 594, 96 N. W. 273.) But as

“The liability of each officer is a personal liability, depending upon the diligence which he himself exercises as a guardian of the public weal to see that the streets are kept reasonably safe. * * * It is the universal rule that a public officer is not personally liable for the negligence of an inferior officer, unless he, having the power of selection, has failed to use ordinary care in the selection.”²¹

II. GOVERNMENTAL VS. CORPORATE FUNCTIONS.

§ 2622. Liability in regard to “corporate” duties.²²

The late judicial decisions agree with the earlier ones that a municipal government has a double function, first,

already shown, this court has taken a different view, and held that in order to exempt a municipal corporation an equivalent remedy must be provided. Here the legislature has placed the primary duty of construction and repairing sidewalks upon the owner of the abutting property, and has expressly declared such owner liable for failure to perform that duty. It has not attempted to take away the remedy that always existed against the officers of the city for failure to cause repair of defects coming to their knowledge, which latter remedy, while not always perfect and complete, will be found sufficient in many cases. The owner of abutting property is *prima facie* solvent, and it is not required that the remedy afforded should go to the extent of guaranteeing the immediate collection of any judgment that might be obtained, if upon the whole it appears that it is plain and reasonably adequate.” *Caviness v. Vale*, 86 Or. 54, 169 Pac. 98, 99.

²¹ “It is conceived that § 281 of the charter of the city of Portland which attempted to exempt the city from liability for injuries arising from defective streets and to place that liability upon the officer by reason of whose negligence the injury occurred, does not create any new or additional obligation against such officer, as a city official who personally neglects to perform a specific duty was always liable irrespective of any statute prescribing such a liability.” *Colby v. Portland*, 85 Or. 359, 166 Pac. 537, 541, 542.

²² *Bessemer v. Whaley*, 8 Ala. App. 523, 62 So. 473 (enumerating acts from which liability may arise); *Michigan City v. Werner*, 186 Ind. 149, 114 N. E. 636; *Tuell v. Marion*, 110 Me. 460, 86 Atl. 980; *Nelson v. Kansas City*, 170 Mo. App. 542, 547, 157 S. W. 94; *Saulman v. Nashville*, 131 Tenn. 427, 175 S. W. 532, L. R. A. 1915E, 316 (quoting with approval the greater part of § 2622, vol. 6, ante); *Greenville v. Branch* (Tex.

the private, proprietary function, and, second, the governmental function as the arm or agent of the state. The intermingling of these two functions has caused the courts some difficulty in determining the boundary line in separating the two. There is not conflict, however, upon the proposition that the city when exercising a governmental function in good faith, is exempt from liability for damages, and, when exercising its private or corporate powers, it is liable to respond in damages for the negligence of its officers or employers.²³

§ 2623. Liability in regard to "governmental" duties.

The doctrine exempting a municipal corporation from private action for torts resulting from the performance of its governmental functions, steadily adhered to by

Civ. App. 1913), 152 S. W. 478, 486.

South Carolina. "It has been settled by a long line of decisions in this court that an action for damages, for tort will not lie against a municipal corporation, unless the corporation is made liable by statute, because such corporation is merely an agent of the state for governmental purposes." *Parrish v. Yorkville*, 96 S. C. 24, 79 S. E. 635.

Functions voluntarily assumed.

"A municipality is answerable for the acts of its servants or agents in the conduct of functions voluntarily undertaken for its own profit and commercial in character, or to protect the corporate interests in its own way." *Bolster v. Lawrence*, 225 Mass. 387, 114 N. E. 722 (reviewing Massachusetts cases).

"It is no part of its duty as a municipal corporation to engage in a purely business or commercial

enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is purely voluntary on its part, and it thereby assumes a third relation, separate and distinct from the dual relations above considered. While occupying this third relation, no governmental function or corporate duties, as a municipality devolve upon it. It is then engaged in an ordinary business enterprise, and is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation. It is subject to the same liabilities and entitled to the same defenses. No more and no less." *Henry v. Lincoln*, 93 Neb. 331, 140 N. W. 664.

²³ *Pacific Paper Co. v. Portland*, 68 Or. 120, 135 Pac. 871.

the most recent decisions,²⁴ is based on the familiar rea-

²⁴ Alabama. *Bessemer v. Whaley*, 8 Ala. App. 523, 62 So. 473 (giving instances of the application of the doctrine of nonliability).

Colorado. *Luxford v. Denver* (Colo.), 176 Pac. 833.

Connecticut. *Pope v. New Haven*, 91 Conn. 79, 99 Atl. 51.

Georgia. *Atlanta v. Trussell*, 21 Ga. App. 340, 94 S. E. 649, 651.

Illinois. *Jennings v. Peoria County*, 196 Ill. App. 195, 198; *People v. Chicago*, 256 Ill. 558, 100 N. E. 194.

Indiana. *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N. E. 387.

Kansas. *Rose v. Gypsum City* (Kan. 1919), 179 Pac. 348.

Kentucky. *T. B. Jones & Co. v. Ferro Concrete Const. Co.*, 154 Ky. 47, 156 S. W. 1060; *Browder v. Henderson*, 182 Ky. 771, 207 S. W. 479.

Massachusetts. *Bolster v. Lawrence*, 225 Mass. 387, 114 N. E. 722 (reviewing Massachusetts cases).

Missouri. *Cassidy v. St. Joseph*, 247 Mo. 197, 152 S. W. 306; *Nelson v. Kansas City*, 170 Mo. App. 542, 547, 157 S. W. 94.

North Carolina. *Price v. Goldboro Township*, 172 N. C. 84, 89 S. E. 1066, L. R. A. 1917A, 992; *Snider v. High Point*, 168 N. C. 608, 85 S. E. 15; *Nichols v. Fountain*, 165 N. C. 166, 80 S. E. 1059; *Goodwin v. Reidsville*, 160 N. C. 411, 76 S. E. 232.

Wisconsin. *Engel v. Milwaukee*, 158 Wis. 480, 149 N. W. 141.

Obstructing a navigable stream

by a bridge. *Tuell v. Marion*, 110 Me. 460, 86 Atl. 980.

"The great weight of authority in this country is that a municipality is not liable for the commission of a tort in connection with its governmental functions or duties in the absence of statutory enactment." *Hattiesburg v. Geigor*, 118 Miss. 676, 79 So. 846.

"In the absence of a statutory provision permitting it an action will not lie against a municipal corporation for damages caused by the negligence of its officers, agents and servants in the performance of the public or governmental duties of such corporation." *Brunson v. Santa Monica*, 27 Cal. App. 89, 148 Pac. 950.

"There is no rule of law more firmly established than that the municipal corporation is not liable in damages for the torts of its agents committed in the exercise of its governmental functions, one of the highest and most characteristic of which is the power of taxation." *Simmons Hdw. Co. v. St. Louis* (Mo.), 192 S. W. 394, 398.

"Whatever the rule may be in other states it has been repeatedly held in Oregon that a municipal corporation in performing the duties imposed upon or delegated to it exercises of a private, proprietary function for the benefit of its inhabitants alone, and known as a ministerial duty, and also discharges a governmental obligation, in the performance of which it acts as agent of the state and for the entire public, and when a

son that the undertaking is not to promote the private interests of the municipality as a corporate entity, but rather for the public benefit, and in the performance of such obligation the municipality is a mere public agent, either of the state or of the local community. The reason, as often expressed, is one of public policy, to protect public funds and public property. "Taxes are raised for certain specific governmental purposes; and, if they could be diverted to the payment of the damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired if not totally destroyed. The reason for the exemption is sound and unobjectionable. But when an individual or private cor-

city, incorporated village or town is employing the latter power in good faith, it is exempt from liability for damages; but when performing the former function, the rule of respondeat superior governs in respect to an injury occasioned by the negligence of the officers and agents of the municipal corporation." *Humphrey v. Portland*, 79 Or. 430, 154 Pac. 897, 902, citing § 2623, vol. 6, ante.

Dual capacity, not liable in governmental. Improper use of streets; automobile race. *Rose v. Gypsum City* (Kan. 1919), 179 Pac. 348, 351.

Where township road employees taking shelter in a barn from rain, leave there a box of dynamite cartridges which children find and in playing with the cartridges one exploded and injured a child, held there was no liability against the township, as it was "a tort pure and simple perpetrated by defendant's agents and employees, if at all, while engaged in the performance of duties governmental in

their nature imposed upon and undertaken by defendant corporation entirely for the public benefit." *Price v. Goldsboro Township*, 172 N. C. 84, 89 S. E. 1066, L. R. A. 1917A, 992.

There is no liability for the performance of a governmental function, however illegally the authority may be exercised. *Davis v. Rome* (Ga. App.), 98 S. E. 231.

In the absence of statute, it is settled that a municipality is not liable for its acts "unless the negligence was in the matter of the exercise of functions private or proprietary in their nature as distinguished from functions purely governmental in nature." *Kellar v. Los Angeles* (Cal.), 178 Pac. 505.

Affirmative defense that the city was engaged in governmental function when the injury for which the suit was brought was received must be established by the city. *Jones v. Sioux City* (Ia.), 170 N. W. 445, 448.

poration for compensation undertakes to perform work for a municipality, the reason for the rule ceases. It has become a maxim that when the reason for the rule of law ceases the rule itself should cease." Therefore, it was held that where a private corporation by contract with a municipality was engaged in operating vehicles to convey persons to and from the city hospital and jail and to carry sick or injured persons from buildings and streets to their residences or homes which by negligence injured a pedestrian in the street such corporation was liable.²⁵

And on like ground a board of underwriters, though not a municipal corporation, was held liable for the negligence of its employees, even when engaged in protecting life and property, and although the service performed might be governmental if performed by a municipal corporation and by a public officer.²⁶

The settled doctrine, just outlined, including generally all duties existent or imposed upon municipal corporations by law for the public benefit, is subject to the limitation that, neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance causing appreciable damage to the property of a private owner without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land.²⁷

And where the right of action is based on the failure of the municipal corporation to use ordinary care in maintaining its streets, public ways and sidewalks in a reasonably safe condition for travel in the usual modes, such negligence in a majority of the states, aside from

²⁵ O'Connell v. Merchants & Police Dist. Telegraph Co., 167 Ky. 468, 180 S. W. 845.

Fire Underwriters, 161 Wis. 615, 155 N. W. 127.

²⁷ Hines v. Rocky Mount, 162

²⁶ Sutter v. Milwaukee Board of N. C. 409, 78 S. E. 510.

statutory or charter provision, furnishes another exception to the principles mentioned, and hence the governmental function doctrine in such cases has no application.²⁸

Accordingly the fact that one was killed while a fireman was driving an automobile to a fire—a governmental function—which struck a hole in the street and collided with deceased, will not relieve the city from liability, since a defective street was the proximate cause of the injury.²⁹

§ 2624. Same—rule in admiralty.

A suit in admiralty will lie for the sinking of a steamer due to the negligence of the servants of a municipality in the management of one of its fire-boats, although by the law of the state where the sinking occurred a municipal corporation is not liable to the owner of property for negligence of firemen in the performance of their duty. The United States Supreme Court has announced the doctrine that for every maritime tort there is redress if the admiralty court has jurisdiction of the offending person or thing; that though a libel in personam is not maintainable against a sovereign, it is not for lack of a cause of action in admiralty, but on account of the sovereign's immunity from process; that a municipal corporation like a private corporation and a person within the reach of the court, is subject to process; and therefore

²⁸ Gatewood v. Frankfort, 170 Ky. 292, 185 S. W. 847.

See § 2720, et seq., post; § 2720, et al., vol. 6, ante.

Contra. In a case determined in Oregon the street had been opened and improved, and the sidewalk, which, as stated by the court, necessarily constitutes a part of the highway for the accommodation of pedestrians, had been put down, but was out of repair, "so that the restoration thereof was a gov-

ernmental duty and enjoined upon the city for the benefit of the public in general. In failing to discharge that obligation the city engineer omitted the performance of a governmental duty by reason whereof the city of Portland is not liable for the damages which resulted from the injury." Humphrey v. Portland, 79 Or. 430, 154 Pac. 897, 902, 903.

²⁹ Cone v. Detroit, 191 Mich. 198, 157 N. W. 417.

that a municipal corporation must respond to a libel in personam if a cause of action is stated under the maritime law, although the same acts of its servants did not constitute a cause of action under the local law of the state.³⁰

§ 2625. Governmental duties distinguished from corporate duties.³¹

Late judicial decisions abound in a variety of forms of expression, in the effort to distinguish governmental from corporate functions. "The difficulty lies not in the statement of the governing principles of law, but in their application to particular facts. The underlying test is whether the act is for the common good of all

³⁰ Chicago v. White Transp. Co. (following Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314) 243 Fed. 358, 156 C. C. A. 138, certiorari denied 245 U. S. 660, 38 Sup. Ct. 60, 62 L. ed. 535.

³¹ Indiana. Mayne v. Curtis (Ind. App. 1920), 126 N. E. 699, 701, citing § 2625, vol. 6, ante.

Massachusetts. Higginson v. Slattery, 212 Mass. 583, 99 N. E. 523.

Mississippi. Hattiesburg v. Geigor, 118 Miss. 676, 79 So. 846, 847, (quoting with approval greater part of § 2625, pp. 5404-5407, vol. 6, ante); Gulfport v. Shepperd, 116 Miss. 439, 77 So. 193, (citing § 2625, vol. 6, ante.)

North Carolina. Harrington v. Greenville, 159 N. C. 632, 75 S. E. 849.

Oklahoma. Oklahoma City v. Hoke (Okl.), 182 Pac. 692, 695, citing § 2625, vol. 6, ante.

Oregon. Payette-Oregon Slope Irrigation Dist. v. Peterson, 64 Or. 46, 128 Pac. 837.

Tennessee. Nashville v. Mason, 137 Tenn. 169, 192 S. W. 915, L. R. A. 1917C, 914 (considering Tennessee decisions.)

United States. Coates v. District of Columbia, 42 App. D. C. 194.

Pedestrian was injured by an obstruction within the line of the street while turning into a path leading to a voting place. It was contended that the city was not liable because the holding of an election, including the erection of a voting place, was a governmental function, and hence the city was not responsible for injuries occasioned to the voters on the premises where the election was being held, but inasmuch as the facts showed the injury occurred in the street, and not on the premises where the election was held, the contention was disregarded. Lund v. Seattle, 99 Wash. 300, 169 Pac. 820.

without the element of special corporate benefit, or, pecuniary profit. If it is, there is no liability, if it is not, there is liability.”³²

“The true test does not rest upon the determination as to whether or not the municipality is reaping a monetary gain.”³³

“The liability or nonliability of a municipality for its torts does not depend upon the nature of the tort, the relation existing between the city and the person injured, or whether the city was engaged in the management of tangible property, but depends upon the capacity, in which the city was acting at the time.”³⁴

“It is not the character or name of the agent who executes the duty of removing the cause of discomfort and ill health to the public which fixes the character of the duty performed, but it is the act itself which determines whether it is governmental or ministerial,” (referring to the removal of street sweepings).³⁵

It is well settled that a municipal corporation is not responsible for the negligent acts of its employees who are endeavoring to carry out the regulations of the city to promote the public health and to care for the sick and destitute.³⁶

“In the collection and disposition of garbage, undoubtedly the city acts for the public health and discharges a governmental function. In this regard, it is an agent or arm of the commonwealth, and for that reason is absolved from liability for the negligence of its employees.” But maintaining a garbage dump near a residence and invading property rights, by creating offensive odors from decaying animal and vegetable mat-

³² *Bolster v. Lawrence*, 225 Mass. 387, 114 N. E. 722, 724, per Rugg, C. J.

Difficulty of distinguishing discussed in *Fowler v. Cleveland* (Ohio 1919), 126 N. E. 72.

³³ *Chafor v. Long Beach*, 174 Cal. 478, 163 Pac. 670, 672.

³⁴ *Kokomo v. Loy*, 185 Ind. 18, 112 N. E. 994, 996.

³⁵ *Savannah v. Jordan*, 142 Ga. 409, 83 S. E. 109, 111, L. R. A. 1915C, 741, Ann. Cas. 1916C, 240.

³⁶ *Johnston v. Chicago*, 258 Ill. 494, 101 N. E. 960.

ter, constitutes a damaging or taking of private property without compensation.³⁷

"It would be a mistake to hold * * * that the immunity of a municipal corporation on the ground that it is engaged in a governmental function only applies to cases where public health is concerned. Public safety and the safety of the lives and the property of the community are just as much of governmental cognizance." Accordingly, "the prevention of the scattering of loose papers upon the streets and the burning of them in public places within a city, or even the burning of papers and refuse in the furnaces of buildings, which may result in dense smoke, and the carrying through the chimneys burning pieces of paper, and the communication of sparks, is a matter which is essentially public in its nature."³⁸

"Nor is it difficult to set forth the definition of governmental functions as applied to a city. Under the theory of the common law, that the municipality is protected from liability only while exercising the delegated functions of sovereignty, the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor and the education of the young. And in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle."³⁹

"In the creation of a system of waterworks and the operation of the same for the purpose of protection against fire, flushing sewers, and other uses pertaining to the public health and safety, the city is in the exercise of the police power and is therefore exercising a governmental function. * * * In supplying water for the use of the inhabitants for domestic and com-

³⁷ Louisville v. Hebemann, 161 167 N. W. 717, 720, per Bruce, C. Ky. 523, 171 S. W. 165, L. R. A. J., citing § 2625, vol. 6, ante.

1915C, 747.

³⁸ Chafor v. Long Beach, 174 Cal.

³⁹ Moulton v. Fargo (N. D. 1918),

478, 163 Pac. 670, 672.

mercial purposes a municipality is not in the exercise of a governmental function but acts in the same capacity as a private corporation although the business is carried on for the public advantage, and being in its nature, is impressed by the public trust.”⁴⁰

§ 2626. Same—imposed duties not distinguishable from those voluntarily assumed.⁴¹

§ 2627. Same—border line cases.

That certain functions of municipal activity may be governmental for some purposes and of private characteristics in others is recognized.⁴²

§ 2628. Legislative, judicial and discretionary duties distinguished from ministerial duties.⁴³

The Georgia code concisely states the rule: “Municipal corporations are not liable for failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they are liable.”⁴⁴

⁴⁰ Eastern Illinois State Normal School v. Charleston, 271 Ill. 602, 111 N. E. 573.

⁴¹ Moulton v. Fargo (N. D.), 167 N. W. 717, 720, (citing § 2626, vol. 6, ante); Pope v. New Haven, 91 Conn. 79, 99 Atl. 51; Heino v. Grand Rapids, 202 Mich. 363, 168 N. W. 512, 514.

That the duty “may be undertaken voluntarily and not under compulsion of statute is of no consequence.” Bolster v. Lawrence, 225 Mass. 387, 114 Mass. 722, 724.

Contra. “The general rule is that the city is not liable to a person sustaining injuries on account of some obstruction in the navigable waters within its boun-

daries, unless the duty to keep such navigable water open and free from obstruction has been expressly imposed upon it by an act of the state legislature.” Kitsap County Transportation Co. v. Seattle, 75 Wash. 673, 135 Pac. 476.

See Pollock v. Wheeling Traction Co. (W. Va. 1919), 99 S. E. 267.

⁴² Heino v. Grand Rapids, 202 Mich. 363, 168 N. W. 512, 516; Simpson v. Paddock, 195 Mich. 581, 161 N. W. 898.

⁴³ Clinard v. Winston-Salem, 173 N. C. 356, 91 S. E. 1039, citing § 2628, vol. 6, ante.

⁴⁴ Atlanta v. Trussell, 21 Ga. App. 340, 94 S. E. 649, 651.

“A city is not liable for the

Where an ordinance constitutes an invalid attempt to exercise in good faith the police power there is no municipal liability. If a city, for example, in an invalid but a good faith attempt to exercise its delegated legislative power over trades should damage a tradesman by reason of an ordinance making his business more expensive to conduct while he was having the ordinance adjudged invalid the city would find shelter from damages under the state's immunity. The ordinance under consideration related to the elevation of railroad tracks in the interest of public travel, and was properly held to be an exercise of the police power.⁴⁵

The conveyance of books from one library building to another by means of an automobile along the public highway by employees of the city is plainly a ministerial duty. For that reason, if for no other, the court held the city liable for negligence of the driver of an automobile employed by the secretary of the library in colliding with another automobile.⁴⁶

"Official action is judicial where it is the result of judgment or discretion. It is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion."⁴⁷

§ 2630. Same—exercise of the police power.⁴⁸

A city or town is not liable for the acts of its em-

exercise of its legislative or judicial powers, but is liable for the improper or unskillful performance of ministerial duties." *McWilliams v. Rome*, 142 Ga. 858, 83 S. E. 945.

⁴⁵ *Chicago v. New York, C. & St. L. R. Co.*, 216 Fed. (C. C. A.) 735.

⁴⁶ *Johnston v. Chicago*, 258 Ill. 494, 101 N. E. 960, affirming 174 Ill. App. 414.

⁴⁷ *Johnston v. Chicago*, 258 Ill. 494, 101 N. E. 960, approving *Chicago v. Seben*, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245.

⁴⁸ *Mayne v. Curtis* (Ind. App. 1920), 126 N. E. 699, 701, 702, quoting with approval the greater part of § 2630, vol. 6, ante; *Clinard v. Winston-Salem*, 173 N. C. 356, 91 S. E. 1039, citing § 2630, vol. 6, ante.

ployees who are acting under the police power granted to such corporation.⁴⁹

Thus failure to make and enforce police regulations relating to the transportation of explosives creates no municipal liability, notwithstanding the municipality had full power in the premises.⁵⁰

Exercising power of removal of garbage and cleaning cesspools, held, governmental, etc. *Gulfport v. Shepperd*, 116 Miss. 439, 77 So. 193, citing § 2630, vol. 6, ante.

A municipality is not liable for the falling of a flagpole which had remained for a period of eleven years, on plaintiff in passing in an automobile, because it is not answerable in tort for failure to exercise its police powers. *Vossler v. De Smet*, 204 Ill. App. 292.

Preserving peace and order at a Fourth of July celebration, including a sham battle, was held a governmental function. Hence there was no municipal liability to one injured in assisting the management of a canon. *Healy v. Kansas City*, 277 Mo. 619, 211 S. W. 59, 61.

⁴⁹ *Johnston v. Chicago*, 258 Ill. 494, 101 N. E. 960.

Stater v. Joplin, 189 Mo. App. 383, 176 S. W. 241, (citing § 2432, vol. 5, ante) holding there was no municipal liability due to the negligence of the driver of an automobile patrol of the city, carrying a prisoner, in colliding with a buggy on the street driven by plaintiff. The fact that the automobile was defective creates no liability, because at the time the city was engaged in a governmental duty, that of preserving the public peace.

⁵⁰ *Zywicki v. Joseph R. Foard Co.*, 206 Fed. (D. C.) 975.

Where a municipality has power to abate nuisances, to protect the health, etc., there is no municipal liability for injury to a child from burning trash, refuse and garbage on a lot. The child playing about a trash pile, caught on fire, was severely burned and died. The function was governmental. *Snider v. High Point*, 168 N. C. 608, 85 S. E. 15.

Action for damages due to explosion of dynamite on a steamship in a harbor, wherein it was sought to hold the city in whose port the explosion occurred liable. "Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the trans-shipment of dynamite, in that it was a place frequented by other vessels, and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in a loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives from which it derives no profit." *Joseph R. Foard Co. v. State*, 219 Fed. 827, 153 C. C. A. 497, affirming 213 Fed. 51.

§ 2631. Same—failure to pass or enforce ordinances.⁵¹

The law is said to be settled in some jurisdictions that a municipal corporation is not liable for failure to enforce its own ordinances.⁵²

The making or enforcing of ordinances or other provisions regulating the use of streets, it is generally regarded, involves governmental and not corporate functions. There is no liability on the part of the municipality for an omission of duty in this respect, it is held in Tennessee, unless such liability is imposed by statute.⁵³

In Kansas it was held that one injured by a vicious cow while on her own premises which the officers of the city knowingly permitted to run at large contrary to

⁵¹ Curran v. Chicago Great Western Ry. Co., 134 Minn. 392, 159 N. W. 955.

Where the enforcement of ordinances are committed to a board, as a police board, a municipality is not liable for injury for failure to enforce ordinances, relating for example, to the manner of loading explosives for transportation. Unless such right of action is given by statute there is no municipal liability for failure to exercise authority to provide for the safety of persons or property where its corporate or proprietary interests do not require such action. This is a governmental function for the nonperformance of which it is not liable. Gutowski v. Baltimore, 127 Md. 502, 96 Atl. 630.

The charter gave the city power to exercise control and management of the harbor and waterfront of the city and provided that it should by ordinance establish such supervision as should prevent any encroachment of the same pursuant thereto. An ordinance was

passed making it unlawful for anyone to discharge or deposit any refuse made of any kind or description into the navigable waters of the harbor. The ordinance also made it the duty of the port warden to exercise vigilant control and supervision over the harbor and to enforce all of the ordinance of the city in relation thereto. A steamer in the harbor was injured by timbers which had been negligently thrown into the harbor by third persons. In holding the city not liable the general rule was applied that a city is not civilly liable for negligence of duty on the part of its officers in respect to the enforcement of ordinances. Kitsap County Transportation Co. v. Seattle, 75 Wash. 673, 135 Pac. 476.

⁵² Salmon v. Kansas City, 241 Mo. 14, 46, 145 S. W. 16.

⁵³ Gainesboro v. Gore, 131 Tenn. 35, 173 S. W. 442, holding non-liability of a town for death to a horse that was loose in the streets in violation of a local regulation.

the provisions of an ordinance created no municipal liability.⁵⁴

⁵⁴ "The subject of cattle running at large within the corporate limits was not one involving the interests of the city in its private, proprietary capacity, but was one appealing to its governmental functions, exercisable in the interest of the general public welfare. The distinction between quasi private power and governmental power possessed by municipal corporations is fundamental in the law of this state. If the city had failed to pass an ordinance regulating the running at large of cattle in the corporate limits it would not have been liable to the plaintiff, because the power not exercised was legislative, discretionary and purely public in character. In such cases the city, as a governmental agency of the state, enjoys the same immunity from suit which the state would enjoy if it omitted to enact a public welfare law. However, the city did pass an ordinance the sufficiency of which was not questioned, and the breach of duty alleged was failure to enforce the ordinance. The enforcement of ordinances is an executive function. In the case of governmental ordinances the function is exercised by the police force and those responsible for the policing of the city. The executive function partakes, in any case, of the same quality as the legislative function. If an ordinance be ministerial in character the city will be liable for the failure of its officers to execute the ordinance the same as a private individual would be. If, however, the ordinance be one en-

acted pursuant to the city's governmental powers the city is not liable in damages for the non-feasance or for the misfeasance of its officers in executing it. Although elected or appointed by the city, paid by the city, and subject to discharge by the city, its officers are public officials and not agents of the corporation for whose neglect or misconduct the city can be held responsible in a civil action according to doctrine of respondent superior. Even although the conduct of the city officers be in conscious disregard of the terms of an ordinance, and they have reason to anticipate that injury will result to somebody, the remedy is not by way of an action for damages against the city. Until the legislature changes the theory of our municipal institutions and creates a duty on the part of the municipality to open its treasury for the reimbursements of persons who suffer from misconduct on the part of its executive officers in the discharge of governmental functions, the courts are closed to actions prosecuted for that purpose.

"An exception exists with reference to maintaining public streets and ways in a condition of safety for public travel. This duty is regarded as having been imposed directly upon the city. Being so imposed the duty is ministerial in character and the city is responsible for negligence in discharging it. In this case, however, the cow was not endangering travel on a street when the plaintiff was injured. The plaintiff was not using

However, the statement of the general rule is sometimes varied to the effect that, while the ordinances themselves do not make a prima facie case they may be considered with other facts in determining the question of negligence or no negligence on the part of the city.⁵⁵

any street at the time, and she suffered no injury in consequence of any defect or danger existing in any street. In this connection it may be observed that the liability of a city for the condition of its streets extends to structural defects, obstructions, want of repair and the like, making travel upon the streets dangerous. It does not extend to improper and unreasonable uses of the highway contrary to governmental ordinances enacted for the convenience and safety of the traveling public, and the city is not liable for breaches of such ordinances, although committed with the knowledge or even the participation of its officers. For example, if the mayor of a city, its commissioner of streets, and its chief of police were to act as starter, judge and time keeper of an automobile race on its principal street at a time when the street is crowded with people, the victims of the unlawful enterprise would have no right of action against the city. It has been so held in numerous cases involving coasting, bicycle riding, horse racing and other forbidden conduct. * * * The Supreme Court of the state of Maryland holds different views. Corporate liability has been affirmed in a coasting case, a bicycle riding case, and a cow case which doubtless prompted the plaintiff's suit. *Cochrane v. Forstburg*, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728,

48 Am. St. Rep. 479. The principle there applied was that a municipal corporation is bound to exercise powers granted to it by the enactment of proper ordinances for the promotion of the public welfare. Having power to enact an ordinance to prevent cattle from running at large within the city limits, a city is liable if it fails to exercise the power to a person gored by cattle running at large. In the bicycle riding case (*Haggardstown v. Kalotz*, 93 Md. 439, 49 Atl. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437) the principle was extended, and it was held logically enough, that the corporate duty is not disregarded by the passage of ordinances in the interest of the public welfare. The city can relieve itself from civil liabilities in damage only by a vigorous attempt to enforce its ordinances. A cow, case in harmony with the rule established by the great weight of authority is that of *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787." *Everly v. Adams*, 95 Kan. 305, 147 Pac. 1134, 1135, 1136, L. R. A. 1915E, 448, per Burch, J.

⁵⁵ *Ryan v. Kansas City*, 232 Mo. 471, 485, 134 S. W. 566.

"The petition alleges that the city contracting through its engineer with the construction company stipulated and covenanted that each and all of its ordinances applicable to the doing of the work

In Maryland it appears that municipal corporations are liable for any neglect to enforce ordinances passed in the exercise of their corporate powers, except where

in question should be complied with (including the ordinance regulating blasting and requiring competent and licensed persons for that duty.) This obligation assumed by the city enured to the benefit of all persons who would be injured by its breach. The defendant city, according to the allegations of the petition, committed an intentional and known breach of this contract and duty assumed by it and became liable for this neglect to any person thereby injured. This was not a case of liability arising from the failure on the part of the city to enforce a police ordinance. But the case made by the petition and the contract entered into by the city, is one for negligent breach of duty to require and prescribe safeguards to be employed in the doing of the work. That an action may be brought against the city which has let out work on its streets, for negligence, and that the ordinances of the city regulating such work are evidentiary, in support of such action, has been distinctly and positively announced by this court in a recent opinion with great clearness and force. According to the positive allegations of the petition under review, a cause of action is stated against the city for negligent breach of its duty to require the work of sewer construction to be performed in strict accordance with its own ordinance safeguarding it. That ordinance and the contract requiring

its precautions to be observed are set out in the petition in this case, and the charge is that the city negligently and knowingly failed to do its duty assumed by its positive agreement. Now, in speaking of the force and admissibility of such a precautionary ordinance, this court said: 'The ordinances themselves do not make a *prima facie* case, but may be considered with other facts in determining the question of negligence on the part of the city.' (Ryan v. Kansas City, 232 Mo. 471, 485, 134 S. W. 566). This differentiation between a cause of action originating from mere non-enforcement of a police ordinance and a cause of action based on negligence, in support of which such an ordinance is admissible, is clear and conclusive. Under the duty assumed by its contract in this case, the city was bound to require the observance of the safeguards prescribed by it, and which is covenanted to do in the very terms of the contract itself. Its negligence in failing to do this is the origin of one of the causes of action in the petition. Hence the ordinance in question is admissible in evidence as tending to prove that negligence, and for the added reason that the city contracted that it should be obeyed in this particular instance." Salmon v. Kansas City, 241 Mo. 14, 70, 71, 76, 145 S. W. 16, from dissenting opinion of Bond, J.

the power to enforce them is given to an independent board or officer.⁵⁶

It is often said that an exception to the general rule exists with reference to maintaining public streets and ways in a reasonable condition for public travel in the usual modes.⁵⁷

However, such duty exists in most jurisdictions irrespective of the enactment or enforcement of ordinances for this purpose.⁵⁸

§ 2632. Same—granting, refusing or revoking licenses.

The exercise of the power to grant or refuse a license to erect a building, is held to be a governmental function.⁵⁹

§ 2633. Defects in plan of construction.⁶⁰

Late decisions support the general statement that a municipal corporation acts judicially when it selects a plan for some public improvement; but as soon as it begins to carry out the plan it acts ministerially and is bound to see that the work is done in a safe manner.⁶¹

⁵⁶ Consolidated Apartment House Co. v. Baltimore, 131 Md. 523, 102 Atl. 920.

⁵⁷ Everly v. Adams, 95 Kan. 305, 147 Pac. 1135, 1136, L. R. A. 1915E, 448.

Ash can was put on sidewalk in violation of an ordinance which a child at play ran into receiving injuries. Sullivan v. American Cigar Co., 174 N. Y. S. 361.

⁵⁸ Section 2720, post; § 2720, vol. 6, ante.

⁵⁹ Clinard v. Winston-Salem, 173 N. C. 356, 91 S. E. 1039.

⁶⁰ See § 2766, post.

Long v. Chicago, 178 Ill. App. 577; Diamond v. Attleborough, 219 Mass. 587, 107 N. E. 445; Gaines v. New York, 142 N. Y. S. 401, 404,

156 App. Div. 789, affirming 137 N. Y. S. 964, 78 Misc. Rep. 126; Hineckley v. Seattle, 74 Wash. 101, 132 Pac. 855, 46 L. R. A. (N. S.) 727; Robinson v. Oconto, 154 Wis. 64, 142 N. W. 125; District of Columbia v. Pierce, 44 App. D. C. 126, 141.

⁶¹ Walters v. Carthage, 36 S. D. 11, 153 N. W. 881; Johnson v. Chicago, 258 Ill. 494, 101 N. E. 960.

Bridge. Where a city has in good faith adopted the plans and specifications for a bridge, prepared by competent and skillful engineers who were at the time of its construction and prior thereto and thereafter familiar with the drainage area and conditions of the creek over which it was built, and

But the fact that a municipal corporation has a right to exercise general governmental plans in the construction of streets, street crossings and sidewalks does not relieve it from negligence of construction or maintenance of such plans. In its governmental capacity the municipality may adopt a general plan of street improvement, and if an injury results from a danger inherent in the plan adopted, it is sometimes held there is no municipal liability. But if the danger has arisen from negligent construction and maintenance of the plan, the municipality is liable for resulting damages.⁶²

who prepared the plans in the exercise of their best judgment and skill, and the bridge was constructed in accordance therewith, the city cannot be held liable even though damages does result by reason thereof. *Wm. Thackaberry Co. v. Simmons Warehouse Co.*, 170 Iowa 203, 152 N. W. 779.

⁶² *Birkhimer v. Sedalia* (Mo. App.), 200 S. W. 298, 300 (following *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168, and *Gallagher v. Tipton*, 133 Mo. App. 557, 560, 113 S. W. 674).

In an action for an injury due to a pedestrian colliding with a hydrant in the street which was unlighted the court remarked: "This hydrant was a part of the general water system of the village and it satisfactorily appears that its location was the result of the determination of the proper authorities. It is adjudged that the selection of the location of this hydrant was a feature of the general plan for the water system, and that in making such selection the authorities acted in a semi-judicial capacity, and that hence the municipality is not liable for any error in judgment in such

selection. The defense of 'governmental function' is well recognized in this state (*Wilcox v. Rochester*, 190 N. Y. 137, 82 N. E. 1919, 17 L. R. A. (N. S.) 741, 13 Ann. Cas. 759) and, in general, a municipality cannot be held responsible for the consequences of the exercise of such function. It must be conceded that the selection for the location of this hydrant had to be vested somewhere, and that our form of government vested it in the authorities of this village. It is equally true that the advantageous distribution of water to the community, and proper protection from fires, requires such hydrants to be located somewhere within the confines of the street. The authority to select this particular location undoubtedly existed in the municipal authorities, and no one could compel the removal of the hydrant to another location. But while this power did exist there was likewise certain duties imposed upon this municipality. Streets are not alone for the location of hydrants, and in fact, that is not their primary use. They are for the use of individuals in passing from one locality to another

The same rules that govern a defective plan adopted resulting in injury to a traveler or other person, and not to his land, does not apply to a plan adopted by a municipality where such plan takes or damages private property for public use without compensation. A plan adopted by a city which would take or damage private property for public use if executed would make the city liable to the owner in damages to the same extent that a negligent construction under a good plan would create municipal liability.⁶³

The *distinction between a nuisance and defects in plan of construction*, (relating to a building) has been clearly stated thus: "Where the injury is due, not to improper construction inherent in the plan, but to the failure to construct in accordance with the proper plan, the liability of those who thus failed to follow the plan stands in negligence and not in nuisance. Where injury is due to improper construction inherent in the plan, a municipal corporation owning the building may nevertheless avoid liability for its fall if it appear that the plan was prepared for it by a competent independent architect, upon whose judgment and advice the municipal officers relied, unless the plan was so obviously bad as to suggest insecurity to an ordinary and reasonably prudent owner."⁶⁴

for their purpose and pleasure. The active duty devolved upon these same authorities to keep this street in a reasonably safe condition for travel. While the power existed so to locate this hydrant as they saw fit, yet this did not lessen their duty to the traveling public or to the plaintiff. If in the exercise of such power they selected a location which made the use of the street inherently dangerous, then their plain duty arose to safeguard travelers from injury in so doing. This end might be accomplished by lights or barriers; and in the absence of all warning

the village cannot escape the consequence of its negligence of a positive duty by merely ascertaining an unquestioned right to place the obstruction within the line of travel. The mere right cannot over-ride the plain and positive duty." *Berger v. Solvay*, 141 N. Y. S. 995, 156 App. Div. 440.

⁶³ *White v. Springfield*, 189 Mo. App. 228, 235, 236, 173 S. W. 1090, 1092, citing § 2633, p. 5429, vol. 6, ante.

⁶⁴ *Herman v. Buffalo*, 214 N. Y. 316, 108 N. E. 451, 454, per Bartlett, C. J.

§ 2634. Construction or repair of public improvements or works.⁶⁵

In the improvement of streets the municipality acts in two capacities, governmental and ministerial. It is not liable for acts performed in its legislative or governmental capacity, but it may be held liable for injurious resulting from ministerial acts relating to the improvement and maintenance of public streets.⁶⁶

⁶⁵ Section 1968, et seq., ante; § 1968, et seq., vol. 6, ante. *Jones v. Atlanta*, 142 Ga. 151, 82 S. E. 540; *Connell v. Yazoo & M. V. R. Co.*, 141 La. 701, 75 So. 652; *Piqua v. Morris*, 98 Ohio 42, 120 N. E. 300; *Mackay v. Port of Toledo*, 77 Or. 611, 152 Pac. 250.

Liability for change of grade of street. *Eickhoff v. Argenta*, 120 Ark. 212, 179 S. W. 367.

Elevation of railroad tracks. *Catholic Bishop of Chicago v. Chicago*, 177 Ill. App. 187.

Injury due to the caving in of a sewer trench being constructed through a principal street for which municipal liability may arise. *Barrett v. Princeton*, 135 Minn. 56, 160 N. W. 190.

⁶⁶ *Nelson v. Kansas City*, 170 Mo. App. 542, 547, 157 S. W. 94.

In the construction and maintenance of streets and sidewalks a city or town acts in its proprietary capacity and is liable for negligence therein. *Ryder v. La Grande*, 73 Or. 227, 144 Pac. 471, quoting with approval part of § 2634, vol. 6, ante.

In the prosecution of the duties of the work of repairing a street the municipality performs a ministerial duty, and is not in the discharge of a duty enjoined upon it as a subdivision of the state in

the exercise of legislative powers. *Jourdan v. La Grange*, 55 Ind. App. 502, 104 N. E. 104.

City held liable for the negligence of the driver of one of its wagons used in street grading work which collided with a street car resulting in the death of the conductor thereof, on the theory that the work was not of a governmental nature. *Jones' Admr. v. Richmond*, 118 Va. 612, 88 N. E. 82, quoting with approval part of § 2634, pp. 5431-5433, vol. 6, ante.

"A municipal corporation cannot be held liable for consequential injuries that result from the construction of public works, in the absence of negligence or want of due care or skill, and this includes the construction, maintenance and operation of sewers and streets." *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N. E. 387, 389.

"A municipal corporation is not liable for mere consequential injuries resulting from an ordinarily careful administration of a reasonably prudent plan of street improvement devised by the municipality in its governmental capacity; but in the execution itself of any public works, the city acts ministerially, or in the words of the statute, 'in its corporate char-

A city is not liable for such tearing up of its streets as may be reasonably necessary to improvement in progress thereon. But where a strip on a street undergoing repairs is left for travel it is the duty of the city to use reasonable diligence to maintain such strip in as safe condition as may be consistent with the work of the improvement.⁶⁷ A city in constructing a subway through its contractors discharges a proprietary and not a governmental function.⁶⁸

§ 2636. Cleaning streets—dumping grounds.

In street cleaning and the establishment and maintenance of dumping grounds, while diversity of judicial views still prevails, late cases generally hold, with some

acter and within the scope of its authority,' and for its negligence or maladministration in that relation, resulting in an injury to the rights of another, it is liable in the same way and for the same reason as a natural person or private corporation would be under the same circumstances of executive management." *Warren v. Astoria*, 67 Or. 603, 135 Pac. 527, quoting from *Giaconi v. Astoria*, 60 Or. 12, 34, 113 Pac. 855, 118 Pac. 180, 184, 37 L. R. A. (N. S.) 1150.

"While a municipality is not liable in damages for consequential injuries to property abutting on a street, resulting from a lawful grading of the public street, when due care is exercised in such grading, the municipality is liable in damages for its unlawful and negligent acts in grading streets that approximately and substantially injure persons or property." *Gonzalez v. Pensocola*, 65 Fla. 241, 61 So. 503.

If in the exercise of the power to construct sidewalks the agents and officers of the city commit trespass on private property, contrary to law municipal liability arises. *Persons v. Valley City*, 26 N. D. 342, 144 N. W. 675.

While a municipal corporation is not liable for the wrongful acts of its officers, even when committed by an officer in the performance of his duty, this rule does not go to the extent that where the city undertakes to perform an act which it is authorized by law to do and for the performance of which it is necessary to destroy or damage property that the city is not liable therefor, for example where it wrongfully destroys trees unnecessarily. *Simpson v. Gibson*, 164 Ill. App. 147.

⁶⁷ *Asher v. Council Bluffs*, 164 Iowa 661, 146 N. W. 457.

⁶⁸ *Sinsheimer v. Underpinning & Foundation Co.*, 165 N. Y. S. 645, 653, 178 App. Div. 495.

exceptions,⁶⁹ that such function is governmental,⁷⁰ rather

⁶⁹ *Maryland*. Action to recover damages for failure of the city and commissioner of street cleaning to remove the ashes and household refuse from plaintiff's premises for a stated period, which damages consisted of the expenses incurred by the plaintiff in the removal of such ashes and household refuse from his property. "It is clear that in this state municipal corporations are liable for the negligence of their officers in respect to the enforcement of municipal ordinances passed in the exercise of powers conferred upon them, except where such corporations are deprived of the power to enforce their ordinances by statute." "Municipal corporations are liable for any neglect to enforce ordinances passed in the exercise of their corporate powers, except where the power to enforce them is given to an independent board or officer." *Consolidated Apartment House Co. v. Baltimore*, 131 Md. 523, 102 Atl. 920.

⁷⁰ Negligence of city's employees in handling fire on dumping ground causing fire to building creates no municipal liability. "The doctrine of respondent superior does not apply to such employment." *Reilly v. New Brunswick* (N. J. L. 1919), 108 Atl. 107.

An employee of a city injured while engaged in "hauling the sweepings of the street," creates no municipal liability because as an employee of the city he "was in the exercise of a governmental function." "It is a matter of common knowledge that the sweepings of the streets contain matter

other than dirt and trash which is offensive to the sense of smell and which, if allowed to remain, will tend to affect not only the comfort but the health of the community as well." *Savannah v. Jordan*, 142 Ga. 409, 83 S. E. 109, 111, L. R. A. 1915C, 741 Ann. Cas. 1916C, 240, and note 243.

There is no municipal liability for injury due to negligence of a driver of a dump wagon used by a municipality in cleaning its streets, "because in the care and maintenance of highways the city is exercising a governmental duty, not for its own advantage or gain, but as an administrative agency of the state."

"There is no common law liability as expressed by the maxim *respondere superior* in such cases." *Bruhnke v. La Crosse*, 155 Wis. 485, 144 N. W. 1100, 50 L. R. A. (N. S.) 1148; *Evans v. Sheboygan*, 153 Wis. 287, 141 N. W. 265.

A city kept and supervised a dumping ground, and plaintiff hauled a load of refuse to the ground, and dumped the same as directed by the city superintendent of the grounds, and when dumping a smoldering fire flashed up and burned plaintiff. *Moulton v. Fargo* (N. D.), 167 N. W. 717, distinguishing *Haley v. Boston*, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. (N. S.) 1005.

"The maintenance of the dump, indeed, and the ordinance in relation thereto may have been both for the purpose of the public health, the keeping of the streets clear from refuse, and the protection of the city from fire, smoke,

than proprietary, exercised by the municipality as an administrative agency of the state or for the public in the interest of the public health and general welfare, and hence, negligence relating thereto creates no municipal liability,⁷¹ unless in the exercise of such power a nuisance in fact is thereby created and maintained by the municipality.⁷² *

§ 2637. *Ultra vires* acts.⁷³

“If in attempting to carry out one of its authorized functions a municipality exceeds its statutory authority

offal, odors, and the disease and injury which arises from rotting and decaying substances.” *Moulton v. Fargo* (N. D.), 167 N. W. 717.

In California, aside from statute, a municipality was held exempt from negligence in maintaining a dumping ground, the same being in the street, a public work and the property of the city, notwithstanding the officers of the city did “compel and permit the plaintiff to use said dump so maintained, operated and conducted as to cause the horses and wagon of the plaintiff to fall therein and in the pit thereof,” with consequent damage and injury. “In the absence of a statutory provision declaring otherwise, a municipal corporation in California is not liable in damages for the negligence of its officers or agents in the maintenance or care of streets or bridges, or for such negligence committed while engaged in repairing a sewer. The question at bar comes within the doctrine of these cases of non-liability. The complaint does not definitely state for what purpose the so-called dump was being maintained; but it is stated that the

dump was a public work of the city, and that the plaintiff was compelled, as well as permitted to use it. This implies the use of a power of compulsion for some public reason, such the exercise of the police power for protection of the public health. The decisions in other states * * * show that there is a conflict of decisions on the question here presented; but it is equally clear that the rule in this state is as above stated.” *Brunson v. Santa Monica*, 27 Cal. App. 89, 148 Pac. 950.

⁷¹ Removal of garbage, § 2669, post.

⁷² Section 2641, post; § 2641, vol. 6, ante.

⁷³ *Boise Development Co. v. Boise City*, 30 Idaho 675, 167 Pac. 1032, 1034, quoting with approval part of § 2637, vol. 6, ante.

“A city is only liable when the officers act within the scope of their authority.” *Silva v. McAlester* (Okl.), 148 Pac. 150, 152.

Act done by officer, as cutting down trees, without authority, will not render the corporation liable. *Moore v. Coal Township*, 56 Pa. Super. Ct. 55.

the corporation is not liable for injuries that result.”⁷⁴ Thus where a city had no authority to change the grade of a street without an ordinance, constructing a sidewalk by order of the city which changed the street grade, was held an ultra vires act and absolutely void.⁷⁵ To create liability certain statutes require that the act or omission causing the damage must have arisen while the agent, officer or employee of the municipality was acting in the line of his duty.⁷⁶

§ 2640. Same—acts under, or enforcing, void ordinances.

Late cases adhere strictly to the well settled rule, that no municipal liability arises from acts by virtue of void or unconstitutional ordinances or resolutions emanating from the exercise of governmental powers.⁷⁷ Thus an

“A municipal corporation is not liable for the deeds or omissions of its servants done ultra vires. And this is true whether they acted with or without the express command of the municipality. (Healdsburg, E. L. & P. Co. v. Healdsburg, 5 Cal. App. 562, 90 Pac. 955). A municipal corporation may exercise only such powers as have been conferred upon it by charter or general law. * * * As the charter of Santa Barbara did not confer upon the water commissioners the power to perform the work on the tunnels by day laborers, it follows that any contract which they made with plaintiff was void, consequently he was not in contemplation of law in the employ of the city and may not maintain against it any action for personal injuries. If he sued for wages the city would have a perfect defense. The principle * * * is applicable alike to cases arising out of contract and to those sounding in tort. This

must be so because the acts of a municipal corporation done ultra vires are absolutely void and it follows as an inevitable deduction that persons injured because of such acts have no recourse against the municipality.” Foxen v. Santa Barbara, 166 Cal. 77, 134 Pac. 1142, 1144, holding one injured in a tunnel in which he was working could not recover damages.

⁷⁴ Seattle v. Puget Sound Traction L. & P. Co. (Wash. 1918), 174 Pac. 464, 467 (citing 19 R. C. L. § 414, 206 Fed. 955).

⁷⁵ “And it is established law that a city or village is not liable for damages caused by its officers while acting without authority.” Johnson v. Granville, 36 N. D. 91, 161 N. W. 721.

⁷⁶ Bessemer v. Whaley, 8 Ala. App. 523, 62 So. 473.

⁷⁷ Silva v. McAlester (Okla.), 148 Pac. 150, 152, quoting with approval from § 2640, vol. 6, ante.

“Assuming, but not deciding, that the resolution was void, as

ordinance requiring the sale of street car tickets on street cars in the city, limiting the price to be paid therefor, enacted without authority, resulting in loss to a street car company, creates no municipal liability, since "if a municipality ever acts in a purely governmental capacity, it would seem to act so in the passage of an ordinance of this kind in relation to a subject in which the general public is alone concerned, and in which it has no private or proprietary interest."⁷⁸

§ 2641. Nuisances, maintenance of and failure to abate.⁷⁹

The nonliability of a municipal corporation to private action in abating or for failure to abate a public nuisance, apart from statute or charter requirement, rests on the ground that such obligation is governmental.⁸⁰ When

contended by the plaintiff, the act of the commissioner in removing the building while in the exercise of his governmental functions under a void resolution would not render the city liable for his acts under such unconstitutional or void resolution." *Cummings v. Lobsitz*, 42 Okl. 704, 707, 142 Pac. 993, 995, quoting with approval part of § 2640, vol. 6, ante.

⁷⁸ *Seattle Electric Co. v. Seattle*, 206 Fed. (D. C.) 955.

⁷⁹ *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N. E. 387, 391.

Liability may exist for failure to abate a nuisance. *Swentzel v. Holmes (Mo.)*, 175 S. W. 871, L. R. A. 1915E, 926.

Boy scuffling with another in the street fell into pool of water in street into which railroad company has discharged hot water. "Ordinarily the presence of a pool of hot water in a street, unguarded, would be considered a public menace and nuisance." *Curtis v.*

Grand Trunk Ry. Co., 178 Mich. 382, 144 N. W. 824.

⁸⁰ "Municipal corporations are not liable for omission to exercise, or for negligence in the exercise of, public governmental duties. The abatement of public nuisance is such a duty, and for failure or refusal to exercise it municipalities are not liable at the suit of individuals; nor can they be compelled thereto by injunctive or mandatory judicial process." *Florence v. Woodruff*, 178 Ala. 137, 59 So. 435, 437.

The abatement and removal of a frame building by a municipal officer is essentially a governmental act, and where no liability is expressly declared by statute for such act, the municipality will be immune from liability for acts of its officers in abating nuisances. *Cummings v. Lobsitz*, 42 Okl. 704, 708, 142 Pac. 993, 995, citing § 2641, vol. 6, ante.

by charter or statute, or by recognition of the general common law duty, there is imposed upon a municipality the burden of exercising ordinary care to keep its streets or other public places in reasonably safe condition for public travel, it must do so at the peril of liability to one who may be injured or suffer damage by its wilful or negligent failure.⁸¹ Municipal liability may exist, therefore, for nuisances allowed in streets and public ways⁸²

⁸¹ Section 2719, et seq., post.

Excavations as a nuisance renders city liable. *Nemet v. Kenosha* (Wis. 1919), 172 N. W. 711.

⁸² Sections 2750 to 2752, post.

"The principle of law is well settled that if the act which the municipality licenses a person to commit within its limits is not unlawful in itself or inherently dangerous, so as to become a public nuisance, and an injury is occasioned merely in consequence of the manner in which the act is performed, then the municipality is not liable." Thus "the erection of temporary seats along the streets on public occasions is not unusual. It is allowed for the convenience of the public and does not in the least partake of the character of a nuisance." Hence, where injury results in consequence of the negligent construction of a grand stand, or from overcrowding, the city is not liable therefor. *Morgan v. Tarboro*, 174 N. C. 104, 93 S. E. 470.

Plaintiff was injured by reason of his crutch passing through an opening in a drain cover which was concealed by paper and circulars and refuse which had collected. Held, no municipal liability. "It is plain that the town is not liable for the maintenance of a nuisance

arising from the acquiescence of its officers in permitting the sale of newspapers and the distribution of circulars in the streets, even though it be reasonably said that the papers will be thrown into the streets and will accumulate in places where they may be driven by the wind." *Delamaine v. Revere*, 229 Mass. 403, 118 N. E. 660.

"When a city creates a nuisance it is not exercising a governmental function, but is doing something forbidden by law. Where an object is of a construction not forbidden by law, and in a place authorized by law, it is impossible that it should be a nuisance." It is not unlawful to use dump wagons on the street because they may be attractive to children. The rule of the turnable cases so called has no application. *Bruhnke v. La Crosse*, 155 Wis. 485, 144 N. W. 1100, 50 L. R. A. (N. S.) 1148.

Rubbish deposited in the street by permission and invitation of the municipality, which it undertook to remove, instead of requiring or at least allowing the residents to do that work for themselves, but which the village fails to remove within a reasonable time, constitutes a nuisance created with the consent and on the invitation of

which imperil, prevent, or unreasonably impede public travel therein,⁸³ or destroy or materially hamper their customary use.⁸⁴ Nor can the municipality itself create and maintain a nuisance which results in injury to person,⁸⁵ or property,⁸⁶ without liability.⁸⁷ Where the al-

the village authorities, and inasmuch as it is the duty of the municipality to keep its streets free from obstruction where such rubbish results in injury, municipal liability is created. *Lyman v. Potsdam*, 159 N. Y. S. 71, 173 App. Div. 390.

⁸³ Road roller left standing by city too near track struck conductor on street car who was on the running board collecting fares. Roller was so close to track that it would have struck any one on the running board of a passing street car. "Even though the act be of a governmental nature the city cannot commit a nuisance in the discharge of such duty, and, if it does, it is liable for damages resulting therefrom." *Knoxville v. Lively*, 141 Tenn. 22, 206 S. W. 180, holding the roller so placed was a dangerous obstruction and constituted a temporary nuisance.

Whether a curb box located behind a water plug standing in the same alignment with reference to the curb and obscuring it until one was almost in the act of stepping thereon, constituted a nuisance, per se, held to be a question of fact in a particular case. "Though curb boxes when in repair and when located in the outside line or that part of the sidewalk in a city or other municipality, usually devoted to objects of light character, such as shade trees, hitching posts, stepping stones, tele-

phone poles and the like, do not constitute nuisances, or improper use of the streets or walks, and are not, per se actionable obstructions, but they may become so by reason of their defective condition or situation therein, and as a general rule the question presented is one of fact for the jury and not a law for the court." *Courbin v. Huntington*, 81 W. Va. 154, 94 S. E. 38.

⁸⁴ Hitching rack in street as nuisance. *Smith v. Jefferson*, 161 Ia. 245, 142 N. W. 220.

"We have held that hitching posts upon a street authorized by the proper authorities are not a nuisance per se. * * * It does not follow, however, that they may not be a nuisance in fact, under the facts of the given case. If a nuisance in fact, no authority is conferred upon the city to maintain them as such." *Kent v. Harlan*, 170 Ia. 90, 152 N. W. 6.

⁸⁵ The maintenance of a dump as a public work by a municipality creates no municipal liability for personal injuries in connection therewith. *Brunson v. Santa Monica*, 27 Cal. App. 89, 148 Pac. 950.

Liability of a city where injury occurred to a boy playing on one of the city dumps. *Roman v. Leavenworth*, 90 Kan. 379, 133 Pac. 551.

Maintenance of a garbage dump as a public nuisance, as a pile of

leged nuisance was a partially constructed engine house,

garbage left to burn at will during a high wind. "The city was without right to do this." *Nashville v. Mason*, 137 Tenn. 169, 192 S. W. 915, L. R. A. 1917C, 914.

The maintenance of a coyote cage as part of a zoological garden in a park is a governmental function and not a nuisance. *Hibbard v. Wichita*, 98 Kan. 498, 159 Pac. 399, L. R. A. 1917A, 399.

Liable for drowning of a boy in pond in a public street. The theory advanced was the maintenance of an attractive nuisance. *Doyle v. Chattanooga*, 128 Tenn. 433, 161 S. W. 997.

⁸⁶ Where a city creates and maintains a nuisance, which is injurious to private property, the issue of negligence is put out of view, e. g. a sewer outlet. *Clarendon v. Betts* (Tex. Civ. App.), 174 S. W. 958.

In North Carolina the rule is well recognized that neither a corporation or other governmental agency is allowed to create or maintain a nuisance causing appreciable damage to the property of a private owner without being liable for it. *Moser v. Burlington*, 162 N. C. 141, 78 S. E. 74.

"To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land." *Hines v. Rocky Mount*, 162 N. C. 409, 78 S. E. 510.

Maintenance of a septic tank

by a municipality as a nuisance. *Jacksonville v. McCracken* (Tex. Civ. App.), 197 S. W. 309; *Brewster v. Formey* (Tex. Civ. App.), 196 S. W. 636.

City held liable for damages to adjoining property owners caused by its maintenance of a public dumping ground. *Haskell v. Webb* (Tex. Civ. App.), 140 S. W. 127.

City held liable for injury to property due to a nuisance in its attempt generally to clean up the town by throwing trash, rubbish, etc., near plaintiff's dwelling causing injury, etc., to property. *Hines v. Rocky Mount*, 162 N. C. 409, 78 S. E. 510.

A municipal corporation has no right to create a public nuisance, and if it does so it is liable for the resultant damages. Liable for explosion of dynamite causing damage stored on a scow anchored in the fairway of a harbor, where it had remained for some 16 days. The harbor was in charge of a port warden of the city. *Seattle v. Lloyd's Plate Glass Ins. Co.*, 153 Fed. (C. C. A.) 321.

The construction and maintenance of an incinerator plant by a municipality where it burns garbage, dead animals, and all kinds and character of refuse which it is deemed expedient to collect and destroy, and the operation of which injures near property by noisome odors, and deposits on such property of ashes and other undesirable substances, creates municipal liability. *Keene v. Huntington*, 79 W. Va. 713, 92 N. E. 119.

Deposit of garbage so as to pollute a stream which emptied into a

which collapsed while one working upon the building was killed, for which the action was instituted, it was conceded that a municipality is not immune, as a governmental agent, from legal responsibility and liability in case it, in the erection of the engine house, created or participated in the creation of a nuisance. But to create liability, however, the structure must have been inherently and imminently dangerous and a menace to the safety of the deceased, and the municipality must have created or participated in the creation of the dangerous and menacing condition. Moreover, the creation or participation in the creation of the dangerous condition, it was stated, must have been with the consciousness and understanding on the part of the municipality that it was creating it; or it must have been obvious and almost certain to a reasonably prudent man, while the acts were being performed on the part of the municipality, that those acts would create or help to create it. "The condition must have been a purpose or object of the municipality; it must have intended to affect it; or its acts have been so reckless and unwarranted that that intention must be conclusively implied. This is not declaring that it must have intended the danger or the catastrophe. It must have intended the condition, but

fish pond, etc. Question of pleading. *Newcastle v. Harvey*, 55 Ind. App. 243, 102 N. E. 878.

Garbage reduction plant operated by city so as to injure adjoining property creates liability. *Baltimore v. Sackett* (Md. 1919), 107 Atl. 557.

The maintenance of a hog pond within twelve feet of a residence which constitutes a nuisance creates municipal liability, after due notice. *Crawford v. D'Lo*, 119 Miss. 28, 80 So. 377, following *Vicksburg v. Richardson*, 90 Miss. 1, 41 So. 234.

Tuberculosis hospital as a nuis-

ance. *Le Bourgeois v. New Orleans* (La. 1919), 82 So. 268.

87 "Where the charge of maintaining a dangerous nuisance is fixed upon the fall of an improperly constructed building, it must appear in order to render the owner thereof liable as such; (1) that he intended that it should be constructed in the manner that proved to be improper; (2) that he knew or ought to have known that such manner of construction was improper; and (3) that such improper construction caused the injury complained of." *Herman v. Buffalo*, 214 N. Y. 316, 108 N. E. 451, 454.

having that intention, may have thought it was not dangerous or have been thoughtless in regard to it. It must have violated the absolute duty of refraining from the participating acts, not merely the relative duty of exercising reasonable care, foresight and prudence in their performance. The wrongfulness must have been in the acts themselves, rather than in the failure to use the requisite degree of care in doing them, and therein lies the distinction, under the facts of this case, between 'nuisance' and 'negligence,' the one is a violation of an absolute duty; the other a failure to use the degree of care required in the particular circumstances—a violation of a relative duty. A nuisance may be created or maintained with the highest degree of care, and the negligence of a defendant, unless in exceptional cases, is not material."⁸⁸

Rejecting the doctrine of nuisance it was held that there was no municipal liability where one was injured by a vicious cow while on her own premises which the officers of the municipality knowingly permitted to run at large contrary to the provisions of an ordinance.⁸⁹

In seeking to charge a municipality with liability for

⁸⁸ *Herman v. Buffalo*, 214 N. Y. 316, 108 N. E. 451, 453, reversing 143 N. Y. S. 205, 157 App. Div. 819.

⁸⁹ "The plaintiff says the cow was a great nuisance. Granted. The ordinance contemplated so much, but the use of the opprobrious term does not change the facts or the law applicable to the facts. The nuisance, such as it was, was neither created nor authorized by the city, much less created or authorized in any part of any power granted to it or any duty imposed upon it. The existence of the nuisance was not the result of any corporate act. The corporate act forbade the nuisance. The passage of the ordinance was an exercise

of the powers of sovereignty by an agent of the sovereign exhibited in the discharge of the political government duty owed to the public at large. The execution of the ordinance devolved upon the agents of the sovereignty, and the city enjoys the same immunity as the sovereign itself. This has been held in numerous cases involving disease spreading agencies like privies and hog pens, fire spreading agencies, fire works, discharge of cannon, wild animal exhibitions, shooting galleries and other highly dangerous agencies recognized and classified as nuisances." *Everly v. Adams*, 95 Kan. 305, 147 Pac. 1134, L. R. A. 1915E, 448, per Burch, J.

injury due to a nuisance, notice thereof, either actual or constructive, to the city or town is required.⁹⁰

§ 2642. Jails, workhouses, and police stations.⁹¹

⁹⁰ Action for explosion of dynamite in shed of sewer contractor for injury to property. Notice to city failed that the contractor habitually so stored dynamite. *Holman v. Clark*, 272 Mo. 266, 198 S. W. 868.

A wading pool was maintained by the municipality in city playgrounds. The evidence showed that that pool was drained and cleaned on Friday of each week. The injury in question occurred on Sunday. The injury resulted from a girl wader who cut her foot on a glass bottle. "If the pool was drained and cleaned on the Friday previous, the fact that some thoughtless person may have cast into the pool a broken bottle between that time and the time of the injury would not be sufficient to charge the city with maintaining a nuisance. There is no evidence that either the city or the park board, under whose control the playfield was operated had any notice, actual or constructive, that the pool contained broken glass prior to the accident." *Clark v. Seattle*, 102 Wash. 228, 172 Pac. 1155.

⁹¹ City held not liable for the death of one due to fire, who for intoxication had been incarcerated in its lockup. In North Carolina, the general principle exempting municipalities from liability in the performance of governmental functions "is recognized and applied and in respect to jails and lockups

the municipality is held only to the duty of properly constructing and furnishing the prison, and in exercising ordinary care in providing the usual necessities for the prisoners. It is held that if the municipal authorities comply with these requirements the municipality is not liable in damages for the negligence of its officers to care properly for and administer to the wants of the prisoners." *Nichols v. Fountain*, 165 N. C. 166, 80 S. E. 1059.

No municipal liability arises although the city lockup was in a filthy and unsanitary condition where plaintiff was confined by the chief of police for violation of a state law. He was arrested for a violation of a state law and was placed in the city lockup without the authority, express or implied, of the city, but placing him there was the unauthorized act of the chief of police. "Such action imposes no liability upon the city, any more than if he had imprisoned the plaintiff in a pig pen on the premises of an individual which would have not have imposed any liability upon the owner of the lot, without his concurrence in the act." *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391.

Nuisance. Boy walking about a jail was struck on the head by a brick which fell out of and from the wall of the jail from which injury he died. The city owned the field or the property upon which

§ 2643. Fire stations apparatus, etc.

The maintenance and operation of a municipal fire department is a governmental function,⁹² and consequently recent decisions, with some exceptions, sustain the general rule of the earlier cases that no municipal liability arises for negligence in connection therewith;⁹³ as for

the jail was located. It appeared from the condition of the wall it must have been in a bad condition for so long a time as to have given notice upon proper inspection that it was not a safe one to be allowed to remain. The point was made that the wall constituted a nuisance for which the city as the owner of the property was liable. The city was held not liable because in the maintenance of the jail it was performing a governmental duty. *Finkelstein v. New York*, 169 N. Y. S. 718, 183 App. Div. 539, relying on *Lefroys v. Monroe County*, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 205.

⁹² Section 2432, ante; § 2432, vol. 5, ante; *Cunningham v. Seattle*, 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629, 7 Ann. Cas. 805.

"The act of adopting, installing, equipping and operating a fire department is a governmental function, and not a municipal one." *Smiddy v. Memphis*, 140 Tenn. 97, 203 S. W. 512.

"In the extinguishment of fires and in making arrangements therefor the municipality acts in its governmental capacity, and is not liable for damages caused by the negligence of its fire department." *Louisville & Southern Ind. T. Co. v. Jennings* (Ind. App. 1919), 123 N. E. 835, 837.

⁹³ No municipal liability for acts

of its servants and officers in connection with the fire department. *Rogers v. Atlanta*, 143 Ga. 153, 84 S. E. 555.

No municipal liability arises for defects in fire engines and other appliances. *Louisville v. Bridwell*, 150 Ky. 589, 150 S. W. 672, denying liability for injury due to a collision between a vehicle and a fire engine.

In maintaining fire houses with unguarded openings through the floor for the expeditious use of firemen the municipality is in the exercise of a purely governmental function and owes no duty to one falling through one of such openings resulting in injury. *Nicastro v. Chicago*, 175 Ill. App. 634, 636.

Contra, *Walters v. Carthage*, 36 S. D. 11, 153 N. W. 881, holding city liable for injury to a child due to a defective door of a fire engine house.

City held liable for negligence of driver of motor hose truck belonging to city fire department in killing one on a street which was returning to its station. Doctrine of respondeat superior applied. The operation was held ministerial and proprietary. "To adhere to the ancient rule in the presence of existing relations would seem to involve the obvious contradiction that the state, which is formed to protect society, is under no obli-

example, failure to use or negligent use of fire equipment.⁹⁴ In accordance with the rule stated, the fact that the one injured was an employee of the department was held of no consequence. Neither was it of consequence, it was held also, that he was not at the time of receiving his injury going to a fire, if he was then engaged in one of his public duties, as in looking after the horses and

gation, when acting itself, to protect an individual member of society. Such conceptions of sovereign prerogatives are not only illogical, but they offend the spirit of our institutions. We have successfully striven, under a system of checks and balances, to reconcile liberty with authority. Authority should be reconciled with justice." *Fowler v. Cleveland* (Ohio 1919), 126 N. E. 72, 75, overruling *Frederick v. Columbus*, 58 Ohio St. 538, 51 N. E. 35.

94 "A municipality maintaining and operating a fire department exercises a governmental function, and is not liable for the negligence of members of such department." Rule applied to act of fireman in using a hose of the fire department in sprinkling a street when a pedestrian was injured by reason of the two sections of the hose blowing apart, and the force of water caused the hose to strike the pedestrian, etc. *O'Daly v. Louisville*, 156 Ky. 815, 162 S. W. 79, 49 L. R. A. (N. S.) 1119.

"In providing for water at hydrants distributed throughout the city there is no exercise of a private or corporate duty arising out of contract, as where the city is engaged in business of its own for the purpose of gain or profit, but it is exercising a governmental

function and it is not liable for any damage to a citizen if there is a failure to perform it, or to perform it properly or even negligently." No municipal liability arises because of defective equipment as insufficient piping and water pressure, in order to save property from fire. *Howland v. Asheville*, 174 N. C. 749, 94 S. E. 524; *Harrington v. Greenville*, 159 N. C. 632, 75 S. E. 849.

Failure of a municipality to use its fire engines and apparatus promptly or effectively in cleaning out obstructed sewers to avert threatened injury to a property owner creates no municipal liability. "It is well settled law that the maintenance and use of the fire department and equipment of the city belongs to its governmental functions and with reference to either the use or abuse of the same by the city the doctrine of respondeat superior does not apply. The city cannot be held liable in damages for either a negligent use or failure to use its fire engines and equipment. It is not liable for acts of omission or commission, misfeasance or non-feasance with reference thereto." *Hawkins v. Springfield*, 194 Mo. App. 151, 155, 186 S. W. 576, citing § 2432, vol. 5, ante.

equipment of this department.⁹⁵ Another illustration of the principle is that a city was held not liable for the negligent location of one of its hydrants in consequence of which an injury resulted. The rule was conceded that there was municipal liability relating to a water system. Here it was contended that the hydrant in question was a part of the water system and not a governmental structure, while the city argued that it was such structure exclusively constructed and maintained for a governmental purpose. The court concluded that the placing of the hydrant was a governmental act.⁹⁶

On the other hand, late judicial judgments enforce, in particular circumstances, municipal liability in the class of cases herein considered. Thus such liability was enforced in a case of an injury to a child as a result of the negligent construction and maintenance of a certain door upon a fire engine house of a municipality, which door fell upon and injured the child, for the reason, as expressed by the court that "a municipal corporation is performing a ministerial duty in maintaining a fire station and is liable in damages for neglecting to make the same safe."⁹⁷ And it has been held that an injury to

⁹⁵ *Hattiesburg v. Geigor*, 118 Miss. 676, 685, 79 So. 846, 847, quoting with approval from § 2643, vol. 6, ante.

Speed ordinance applicable to fire department where not going to a fire or responding to emergency call. *Dowler v. Johnson*, 225 N. Y. 39, 121 N. E. 487.

⁹⁶ "Strictly speaking, the hydrant in question was not a part of the water system over which the water commissioners had charge, and for which they were empowered to fix water rates; and, though the hydrant was connected with the water main, it was not a part of the water system constructed for the benefit or emolument of the defendant (municipal-

ity), and, though attached to that system, it was set about for the exclusive benefit of the public." "We think, and so hold, that the location of the hydrant in question was a public and governmental act performed by the defendant (city) through its agents, who acted in the capacity of governmental officers and that *Welsh v. Rutland*, 56 Vt. 226, 48 Am. Rep. 762, is full authority for this holding and must control and govern this case." *Morgan v. Stowe (Vt.)*, 104 Atl. 339, 341, 343.

⁹⁷ *Walters v. Carthage*, 36 S. D. 11, 153 N. W. 881.

Contra, *Nicastro v. Chicago*, 175 Ill. App. 634, 636.

property in consequence of a city improperly constructing a fire alarm tower which fell rendered the city liable although the falling of the tower was due to an unusual storm.⁹⁸

Negligent use of vehicles of the fire department on the public streets, in certain conditions, or in view of specified duties imposed by statute, in event of injury to person or property, may create municipal liability.⁹⁹ While

⁹⁸ *Wilson v. Mason City*, 190 Ill. App. 510.

⁹⁹ As to liability for injury to one on a sidewalk due to the negligent management of a team of horses hitched to a fire engine, see *Martin v. New Orleans Board of Fire Comrs.*, 132 La. 188, 61 So. 197.

Injury due to negligence of an employe of city while engaged in the department of fire and police alarm system of the city authorized by statute, in running an automobile used in such service so negligently as to cause injury. *Engel v. Milwaukee*, 158 Wis. 480, 149 N. W. 141.

Under statute of South Carolina a municipal corporation was held liable for injury to one in the street caused by the mismanagement of a team of horses under the control of the municipality being a part of the fire department. "It is as much the duty, according to the allegations of the complaint, for the defendant (municipality) not to mismanage its fire department under its control while driving on the streets as it is to keep its streets in proper repair. The act intends to give a person an action for injury for defect in any street where the defect was occasioned by the neglect or mis-

management of the corporation, and where the person was injured on the street by reason of any defect or mis-management of anything exclusively under the control of the corporation." *Creps v. Columbia*, 104 S. C. 371, 89 S. E. 316.

Where an automobile owned by the city and driven by one of its firemen negligently collides with an automobile on the street the city will be liable. It seems that the negligence was in driving at an excessive speed in violation of the state statute. The driver of the automobile was not performing any service enjoined upon him by the state but was acting under the authority of the city testing an article of the city property. The proviso of the statute as to speed was that it should not apply to police or fire vehicles when answering emergency calls demanding excessive speed. *Opocensky v. South Omaha (Neb.)*, 163 N. W. 325, stating that conditions have greatly changed in the use of the streets in Nebraska since the decision of *Gillespie v. Lang*, 35 Neb. 34, 52 N. W. 810, 16 L. R. A. 349, particularly in the use of automobiles and other dangerous motor vehicles, and the legislature has modified the law announced in that case

a city or town is not liable for negligence of the officers of its fire department in performing their official duties it is liable for negligence in failing to keep its streets safe. A city was held liable, therefore, in these circumstances: A pole erected in one of the streets and used solely for the purpose of supporting a telegraph wire and an alarm box of the fire department system belonging to the city fire department, fell because it had rotted through where it entered the ground. In falling the cross arm upon the pole struck and killed a boy playing in the street. The court reasoned: "We see little room for making a distinction between a dangerous condition of the street caused by a third party for whose acts the city is not responsible, and a dangerous condition caused by a department of the city for whose negligence the city is not liable. It is the duty of the city to exercise reasonable care to keep its streets free from danger, and it possesses the power to do whatever is necessary to accomplish this purpose. If through negligence it fails to perform this duty and injury results from a dangerous condition in one of its streets the city cannot avoid liability by showing that negligence in caring for an instrumentality used in the performance of the governmental duty is what brought about the dangerous condition. * * * If the city permits the dangerous condition to continue after it knew, or ought to have known of its existence, and after it had had a reasonable opportunity to protect the public from the danger, the city cannot excuse its failure to perform its duty of keeping its streets safe and relieve itself from liability for such omission by showing that the dangerous condition of the street resulted from acts done in the performance of another governmental duty, notwithstanding the fact that it is not liable for negligence in the performance of such other governmental duty."¹

as found in the statutes limiting the speed of motor vehicles within cities and villages.

¹Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076.

§ 2644. Collection of taxes or special assessments.

“There is no rule of law more firmly established than that the municipal corporation is not liable in damages for the torts of its agents committed in the exercise of its governmental functions, one of the highest and most characteristic of which is the power of taxation.”²

§ 2646. Infringement of patent.³**§ 2647. Exhibition conducted by municipality.**

No municipal liability arises, it was held in Connecticut, for injury resulting from the exploding of a bomb, a part of the display of fireworks of a Fourth of July celebration, conducted by a municipal corporation. By virtue of permissive charter authority the city made an appropriation for the celebration. Denial of liability was put upon the ground that conducting the celebration which was a public one was the performance of a governmental duty. “A public governmental duty may be imposed upon a municipality by charter as well as by public act. Nor does the fact that the charter does not impose an imperative duty upon the city to appropriate

² *Simmons Hdw. Co. v. St. Louis* (Mo.), 192 S. W. 394, 398.

³ “It is said that the Ohio laws forbid a city to let a contract which involves the use of a patent, excepting upon conditions which were not followed here, and that, accordingly the agents of the city are personally liable, and the city is exempt. We cannot accept this conclusion. The action of infringement rests on torts, not on contract, and the position of the defendant seems to be that a city is not liable for a tort, unless the tort is lawfully committed. Such a description of a tort is difficult to apply. To deny an infringement injunction against a

city is to say that, because the city has lawfully taken plaintiff's property, it may continue to keep it and use it. The liability of a municipal corporation for infringement has been recognized in this court (*Warren v. Owosso*, 166 Fed. 309, 92 C. C. A. 227; *Grand Rapids v. Warren*, 196 Fed. 892, 116 C. C. A. 454) as well as by the Supreme Court (*Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. ed. 1000) and has been expressly upheld in this Circuit. (*May v. Logan Co.* (C. C. A.), 30 Fed. 250, per Jackson, C. J.)” *Akron v. Bone*, 221 Fed. 944, 137 C. C. A. 514, per Denison, C. J.

money to the purposes of the celebration, but merely permits it to be done, change the character of the act done.”⁴

§ 2648. Destruction of property by municipalities.

Under the old common law, as is well known, no recovery can be had for property of the citizen destroyed to prevent the spread of fire.⁵ A township was held not liable because its supervisor cut down trees in opening what was believed to be a street, under circumstances which showed that such supervisor had no authority to cut down the trees and that the street involved was a mere paper street. The act was plainly *ultra vires*.⁶ There is municipal liability for damages, however, for illegally tearing down a wall of a building and for the negligent manner in which it is done, resulting in injury to private property. Where a city has authority to do an act, performance in an irregular way, or by a different instrumentality than that prescribed, will not prevent liability from attaching. A wall abutting on or near by a public street may be torn away by the municipality if it is dangerous to the public. But if this be done summarily, without necessity, it is at the peril of the city.

⁴“That the city was engaged in the performance of a governmental duty in sending up the bombs as a part of the celebration would not excuse it from liability for injuries resulting therefrom if the act of discharging them was in itself intrinsically dangerous. (Colwell v. Waterbury, 74 Conn. 568, 573, 51 Atl. 530, 57 L. R. A. 218.) But it is not alleged that the discharging of the bombs was in itself intrinsically dangerous.” Pope v. New Haven, 91 Conn. 79, 99 Atl. 51, approving Jewett v. New Haven, 38 Conn. 368, 9 Am. Rep. 382, and Mead v. New Haven,

40 Conn. 72, 16 Am. Rep. 14, and in commenting on Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289, said: “That case in all respects parallels the one before us, except that the law under which the appropriation for the celebration was made was a public law applying to all towns. All the questions raised in this case are therein fully discussed.”

⁵Page v. Warrenton, 210 Fed. 431, 433.

See Hotel Cecil Co. v. Seattle, 104 Wash. 460, 177 Pac. 347.

⁶Moore v. Coal Township, 56 Pa. Super. Ct. 55.

If the wall is not in fact dangerous the city will be liable.⁷

§ 2650. Injuries by mobs and rioters.⁸

§ 2651. Same—what is a “mob” or “riot.”⁹

The Kansas statute defines an “unlawful assemblage” as “three or more persons” who “assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace.” It is immaterial under the statute what the primary purpose was for which

⁷ *McWilliams v. Rome*, 142 Ga. 84, 83 S. E. 945, 138 Ga. 581, 75 S. E. 645.

⁸ *Illinois statute*. Whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city is made liable to action for three-fourths of the damages sustained. The liability imposed is not based upon any element of negligence on the part of the city, and recovery may be had in a case where the evidence otherwise justified it wholly regardless of the fact whether the municipality or its officers were or were not guilty of negligence in failing to disperse the work or prevent injury to property. *Arnold v. Centralia*, 197 Ill. App. 73, 77, following *Sturges v. Chicago*, 237 Ill. 46, 86 N. E. 683.

Kansas statute. *Blackeman v. Wichita*, 93 Kan. 444, 144 Pac. 816, L. R. A. 1915C, 578, Ann. 1916D, 18; *Harvey v. Bonner Springs*, 102 Kan. 9, 169 Pac. 563.

Kentucky statute. No person shall maintain such action who

shall have unlawfully contributed by word or deed towards exciting or inflaming such tumult or riot, or who shall have failed to do what he reasonably could towards preventing, allaying or suppressing it. *Tandy v. Hopkinsville*, 160 Ky. 220, 169 S. W. 703, 706.

No liability shall be incurred by a municipality unless the authorities thereof shall have notice or good reason to believe that such riot or tumultuous assemblage was about to take place or having taken place, shall have had notice of the same in time to prevent the injury or destruction, either by their own force or by the aid of citizens of such city. *Tandy v. Hopkinsville*, 160 Ky. 220, 169 S. W. 703.

“Property” as used in the *New Jersey* statute, rendering a city liable for its injury or destruction by any mob or riot, held not to include intangible property. *Wells Fargo & Co. v. Jersey City*, 219 Fed. 699, 135 C. C. A. 371, affirming 207 Fed. 871.

⁹ *Illinois statute* defines mob. *Cline v. Le Roy*, 204 Ill. App. 558; *Arnold v. Centralia*, 197 Ill. App. 73.

the persons assembled, "if they in fact formed and executed the unlawful purpose after they were together." The statute renders a municipality liable for the acts of a mob, comprised wholly of persons confined in the city prison who unlawfully assembled and acted together in assaulting a fellow prisoner in the jail.¹⁰ The fact that the assemblage acts under color of authority as a posse summoned by an officer will not necessarily and of itself furnish a defense to a municipality in an action under the Kansas statute.¹¹

III. RESPONDEAT SUPERIOR.

§ 2652. Respondeat superior doctrine in general.¹²

Municipal corporations, generally speaking fall within

¹⁰ *Blakeman v. Wichita*, 93 Kan. 444, 144 Pac. 816, L. R. A. 1915C, 578, Ann. Cas. 1917D, 188, approving definition given in *Cherryvale v. Hawman*, 80 Kan. 170, 101 Pac. 994, 23 L. R. A. (N. S.) 645, 133 Am. St. Rep. 195, 18 Ann. Cas. 149 (set out in §.2651, vol. 6, ante).

¹¹ "This court cannot declare as a matter of law that the assemblage in the present case was not a mob within the meaning of the statute, because the motive which actuated the assemblage not only at the time it was assembled, but also until the death of plaintiff's husband was brought about, was a question of fact; and if on this vital issue, reasonable minds might draw different conclusions from the evidence we are bound by the verdict of the jury. It certainly cannot be said that the statute affords no redress in a situation which conceivably might happen, where a deputy sheriff or city marshal, or an assistant marshal, called together a posse to assist him in making an arrest for a misde-

meanor, intending under the guise of such a call to take, and did take, the life of the person charged, on the pretense that he was resisting arrest, or that they or some of them were in danger of being assaulted by him. In some of the large cities of our country men have been known to conspire with officers to bring about the death of a person whom they desire to get rid of, and in carrying out such unlawful purpose, to employ the pretense that the person was killed while resisting arrest. In the bandit wars in Mexico, and if some of the stories which are told of the present world war are true, it sometimes happens in other countries that prisoners of war had been shot under the specious or pretense that they were attempting to escape." *Harvey v. Bonner Springs*, 102 Kan. 9, 169 Pac. 563, 569, approving *Blakeman v. Wichita*, 93 Kan. 444, 144 Pac. 816, L. R. A. 1915C, 578, Ann. Cas. 1916B, 188, supra.

¹² *Kraljer v. Snare & Triest Co.*, 221 Fed. 255, 137 C. C. A. 108.

the ordinary rule that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course of his employment. Thus if one employed by a municipality to superintend the work of tearing down a bridge is negligent, and such negligence results in the death of a workman, municipal liability arises.¹³

Statutes sometime declare municipal liability "consistent with the doctrine of respondeat superior."¹⁴

§ 2653. Necessity of relationship of master and servant.¹⁵

No liability arises against the municipality unless it appears that the officer or agent acting was its servant or agent.¹⁶

¹³ *Hass v. White Haven Borough*, 54 Pa. Super. Ct. 75, 80.

¹⁴ *Birmingham v. Carle*, 191 Ala. 539, 68 So. 22, L. R. A. 1915F, 797.

¹⁵ *Tucson v. Dunseath*, 15 Ariz. 355, 139 Pac. 177; *McGovern v. Boston*, 229 Mass. 394, 118 N. E. 667; *Gulfport v. Shepperd*, 116 Miss. 439, 77 So. 193, 195; *Ray v. Huntington*, 81 W. Va. 607, 95 S. E. 23; *Tatsuuma Kisen Gashi Kaisha v. Port of Seattle*, 237 Fed. (D. C.) 289.

¹⁶ *Dupuis v. Fall River*, 223 Mass. 73, 111 N. E. 706.

"An officer charged with the duties of a surveyor of highways is a public officer, and not an agent of the town. In diverting the surface water from Waverly Street into the culvert, he was doing a public work and was in the performance of his duty in keeping the street reasonably safe and convenient for travel. He was not an agent, employe or officer of the town in doing this work, the relation of principal and agent

did not exist between him and the defendant (town)—he was executing a public duty as a public officer—and for his acts the town is not responsible." *Blaisdell v. Stoneham*, 229 Mass. 563, 118 N. E. 919.

Defective wiring in a private house done by contractor for a municipality which furnished electric light and power to its inhabitants for pay, was held act of city rendering it liable for injury resulting therefrom, the contractor being the agent of the city, etc. *Ellas v. New Iberia*, 137 La. 691, 69 So. 141.

If the contractor doing the work is the agent and servant of the municipality, the latter is liable for the negligent acts of such contractor within the scope of his authority. *Pressley v. Sallisaw* (Okla.), 154 Pac. 660, 663.

A municipal corporation engaged under legislative authority in the business of furnishing electric lighting to private consumers for

The question of relationship, in the view of certain decisions, should be determined by the character of the work being performed at the time of the injury rather than the public position of the officer causing it. Thus in a late Nebraska case, a municipality was held liable for the negligent driving of an automobile resulting in injury by a policeman who had been sent on a municipal errand connected with its corporate duties. While the municipality would not be liable for the negligence of its police officer when engaged as a member of the police department in any capacity, it was reasoned that the policeman in going on the errand had lost his character as a peace officer and had become the servant of the municipality in its corporate capacity.¹⁷

§ 2654. Same—by whom appointed or paid immaterial.¹⁸

§ 2656. Acts beyond scope of agents' authority.¹⁹

As acts beyond the scope of the officers' or agents' authority do not create municipal liability,²⁰ unless the

profit is liable for the negligence of the agents employed by it to string the wires designed for such commercial purposes. *Karpinski v. South River Borough*, 85 N. J. L. 208, 8 Atl. 1073, 1074.

¹⁷ *Levin v. Omaha*, 102 Neb. 328, 167 N. W. 214, with two dissenting opinions.

¹⁸ *Augusta v. Cleveland* (Ga. App. 1919), 98 S. E. 738; *Everly v. Adams*, 95 Kan. 305, 141 Pac. 1134, L. R. A. 1915E, 448.

An assistant to an engineer of the municipality who was neither employed nor paid by the municipality but whose work was to supervise the construction of sewers, held not an agent of the municipality so as to render it liable for his negligence in accommodating a

contractor in making sewer connection with premises. *Keedy v. Amherst*, 222 Mass. 72, 109 N. E. 817.

¹⁹ *Van Trump v. Kansas City*, 187 Mo. App. 190, 173 S. W. 32; *Bigelow v. Springfield*, 178 Mo. App. 463, 162 S. W. 750.

²⁰ *Reese v. Lincoln*, 99 Neb. 594, 157 N. W. 327.

A city is not liable for damage to land by reason of surface water being cast thereon, resulting from the construction of a drain under the supervision of the street commissioner of the city, in the absence of an ordinance authorizing such work. *Jones v. Caruthersville*, 186 Mo. App. 404, 407, 171 S. W. 639.

The act of a fireman in taking a child into a fire house and leav-

act, therefore, of the officer or employee which results in injury is within the scope of his employment the municipality will not be liable.²¹

Merely proceeding in an irregular manner or even contrary to law will not always relieve a municipality from liability,²² where the officers or agents are acting within the scope of their duties.²³

ing him unguarded, where such child falls through an opening through the floor, and is injured, is merely the fireman's personal act, and for the consequences of that act the city is not liable. In such case the doctrine of respondeat superior has no application. *Niastro v. Chicago*, 175 Ill. App. 634, 636.

²¹ *Chicago R. I. & G. Ry. Co. v. Porter* (Tex. Civ. App.), 166 S. W. 37.

A municipal corporation is liable for torts committed by its officers only in exceptional cases. Allegations showing merely a wrongful assault on and imprisonment of a plaintiff by officers of such a corporation, as by its marshal and mayor, do not present such a case. Some wrongful act of the municipality must appear. *Swanson v. Nacogdoches* (Tex. Civ. App.), 161 S. W. 83.

²² The municipality is liable for the act of its superintendent of public works in destroying a wall and thereby inflicting injury where he acted within the scope of his authority. *McWilliams v. Rome*, 142 Ga. 848, 83 S. E. 945.

"Where an act is done by the officers and agents of a municipal corporation which is within the corporate power and may lawfully be accomplished if the municipal

authorities proceed according to law, the corporation will be liable for the consequences of an act of such officers or agents proceeding contrary to law or in an irregular manner. If the authorities of a city are clothed with the power to grade its streets and without authority of law they take soil from the private property of a citizen and use it in grading the streets the city will be liable for the trespass." *Atlanta v. Swiney*, 20 Ga. App. 415, 93 S. E. 24.

²³ In a suit for the infringement of a patent against a municipality, it was said: "Under the familiar rules concerning torts by agents of municipalities, it would seem that as the agents, in adopting the infringement, went outside the scope of their duty, and as the city itself would not continue the infringement after notice of what the agents had done, there might be no liability for damages; but this is not such a case. The municipal officers who built this wall have clear authority to obtain the use of the patent by following a prescribed method. In appropriating the patent without permission, they were acting within the scope of their duties, though in violation of specific restrictions, and the city is liable in damages for their tort." *Akron v. Bone*,

A statute providing that no personal action shall be maintained against any member or officer of any municipal corporation for any tort or act done, or attempted to be done, by such member or officer, when done by authority of such municipal corporation, or in execution thereof, and that in all such cases a municipal corporation shall alone be responsible, it was held, does not relieve an acting officer and cast the responsibility upon the municipality unless such wrongful act is done by authority of such municipal corporation or in execution of the orders thereof. The statute exempts the member or officer from liability, and casts the same upon the city only in those cases where the tortious act was done by authority, or in execution of the orders of the municipal corporation. The statute does not undertake to change the common law rule, except in those cases where the specific tortious act was done under direction of the city, or by its authority.²⁴

§ 2657. Same—ratification.²⁵

§ 2658. Independent boards as municipal agents.²⁶

Clearly no municipal liability can arise from the negli-

221 Fed. 944, 137 C. C. A. 514, per Denison, C. J.

²⁴ *Baca v. Albuquerque*, 19 N. M. 472, 145 Pac. 110.

²⁵ City may ratify unauthorized acts of agents. *Frank v. Jersey City Board of Education*, 90 N. J. L. 273, 279, 100 Atl. 211, 213, citing § 2657, vol. 6, ante.

Presumption that city gave consent or by silence had ratified the act. *Tucson v. Dunseath*, 15 Ariz. 355, 139 Pac. 177, 179.

Payment by the city for unauthorized work, held not to be a ratification. *Jones v. Caruthersville*, 186 Mo. App. 404, 171 S. W. 639.

"It is undoubtedly true that the ratification of an unauthorized act

may make the principal liable in an action of tort for an injury resulting from negligence of an agent in doing the act." Held, no ratification in the particular case. *Keedy v. Amherst*, 222 Mass. 72, 109 N. E. 817.

Where the opening and grading of a street was not authorized or ratified by the city, in the legal manner prescribed, as by ordinance, the acts are the acts of the individuals engaged in the work and not the acts of the city; hence the latter is not liable for the value of the land taken or damaged. *Bigelow v. Springfield*, 178 Mo. App. 463, 470-476, 162 S. W. 750.

²⁶ *Henry v. Saratoga Springs*, 155 N. Y. S. 942, 171 App. Div.

gence of officers, agents or employees of boards or commissions which are distinct corporations or independent bodies, not under the control of the municipality.²⁷ And it has also been held that "officers appointed to carry out a duty imposed upon a municipal corporation by law are not the agents of the municipality, if such duty arises or is implied from the use of political rights under the

827; *Vinson v. Saratoga Springs Comrs.*, 142 N. Y. S. 598, 158 App. Div. 132, *Ankenbrand v. Philadelphia*, 52 Pa. Super. Ct. 581.

Injuries caused by the negligence of an employe of the board of water commissioners of the municipality who managed a water supply system and furnished its inhabitants with water. *Pearl v. Revere*, 219 Mass. 604, 107 N. E. 417.

²⁷ Negligence of a sewerage commission in constructing a sewer where such commission is a distinct and independent corporation, creates no liability against the city. *Louisville v. Frank's Guardian*, 154 Ky. 254, 157 S. W. 24.

Where the board of education is a distinct corporation from the city, excluding the idea of the existence of the relation of principal and agent between them, the municipality is not liable for the torts of the board. *Titusville Iron Co. v. New York*, 207 N. Y. 203, 100 N. E. 806.

Lutenbacher v. Mitchell-Borne Const. Co., 136 La. 805, 67 So. 888, a case where a sewerage and water board of a municipality engaged a contractor to do certain public improvement work and provided that its superintendent should supervise the work. The action was for the death of one

employed on the work; held no municipal liability.

Members of a transit commission created by statute, held not servants or agents of the city, but acting as public officers. "As such the city is not liable for their negligence." *McGovern v. Boston*, 229 Mass. 394, 118 N. E. 667, 669.

Plaintiff was injured by falling over a plank lying on the curbstone. By statute, The Boston Transit Commission was directed to build a tunnel and authorized to make contracts for its construction in the name of the city. The law provided that "all work under or near public streets and places shall be conducted, so far as may be practicable, in such manner as to leave such streets and places, or a reasonable part thereof, open for traffic, between the hours of seven in the forenoon and six in the afternoon of each secular day except legal holidays." The court stated that, "the building of the tunnel was a public work. The Boston Transit Commission are neither servants or agents of the city. They are public officers. The doctrine of respondeat superior does not apply, and the city is not liable for their negligence." *Murphy v. Hugh Nawn Contracting Co.*, 223 Mass. 404, 111 N. E. 890.

general law, in the exercise of which the city acts as a sovereign." The rule was applied in the erection and maintenance of a court house under the control of a court house board appointed under the provisions of a statute, where it was held that the municipality was not responsible for any negligence on the part of the commissioners or their servants.²⁸

§ 2660. Licensees.

Under the Delaware statute making cities liable for injuries on account of a defective condition of a sidewalk only when caused by a municipality or its duly authorized agents, it was held that a city was not liable for injury to a pedestrian by tripping and falling over a ridge or mound of earth covered by boards on the sidewalk due to the negligence of plumbers who had a license to excavate in the street. The court expressed the opinion that such plumbers were not the agents of the city.²⁹

§ 2662. Independent contractors.

The late decisions uniformly invoke the general rule that the contractee is not answerable for the acts of an independent contractor, and apply it to municipal corporations.³⁰

²⁸ D'Orsi v. New York, 171 N. Y. S. 203, 104 Misc. Rep. 66.

Statute applicable construed. Foutz v. Los Angeles, 167 Cal. 487, 140 Pac. 20.

²⁹ The law provided: "The owner of any premises fronting upon any footways shall be solely responsible for any damage that may result to persons or property by reason of any hole, excavation or obstruction in or upon such footways or from any defective condition of such footways, provided, however, that such hole, excavation or obstruction or other

defective condition of the footways aforesaid is not caused by the city or any of its authorized agents." In the case the court was of the opinion that the plumbers, the licensees, or their servants were not the agents of the city, and also that the excavation, obstruction or any defective condition of the footway complained of was not caused by the city or any of its authorized agents. Hoffman v. Wilmington, 4 Boyce 486 (Del. Super.), 90 Atl. 41.

³⁰ Indiana. Julius Keller Const. Co. v. Herkless, 59 Ind. App. 272,

§ 2663. Same—exception to rule of non-liability.³¹

The reservation of the control of the work by the municipality is generally viewed as a sufficient basis upon

109 N. E. 797, 801, 802, citing § 2662, vol. 6, ante.

Iowa. *Law v. Bryant Asphaltic Paving Co.*, 175 Iowa 747, 157 N. W. 175; *Teeters v. Des Moines*, 173 Iowa 473, 154 N. W. 317.

Missouri. *Herman Const. Co. v. St. Louis*, 256 Mo. 332, 165 S. W. 1032; *Ward v. Ely-Walker Dry Goods Bldg. Co.*, 248 Mo. 348, 154 S. W. 478; *Wallower v. Webb City*, 171 Mo. App. 214, 156 S. W. 48.

Massachusetts. *Grier v. Guarino*, 214 Mass. 411, 101 N. E. 981.

New York. *Sinsheimer v. Underpinning & Foundation Co.*, 165 N. Y. S. 645, 178 App. Div. 495; *Reilly v. Barber Asphalt Paving Co.*, 140 N. Y. S. 16, 155 App. Div. 108.

Rhode Island. *Sroka v. Halliday*, 39 R. I. 119, 97 Atl. 965, 973.

Tennessee. *Cash v. Casey-Hedges Co.*, 139 Tenn. 179, 201 S. W. 347.

Washington. *Kaler v. Puget Sound Bridge, etc., Co.*, 72 Wash. 497, 130 Pac. 894; *Larned v. Holt & Jeffery*, 74 Wash. 274, 133 Pac. 460, 46 L. R. A. (N. S.) 635; *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820; *Wilton v. Spokane*, 73 Wash. 619, 132 Pac. 404.

Wisconsin. *Nemet v. Kenosha* (Wis. 1919), 172 N. W. 711.

United States. *Charles A. Cowen & Co. v. Price*, 203 Fed. 473, 121 C. C. A. 618.

Who are independent contractors. *Pressley v. Sallisaw* (Okla.), 154 Pac. 660, 662.

Negligence of servant of a sanitary contractor of a municipality

relating to cleaning of a cesspool, resulting in injury, creates no municipal liability. *Gulfport v. Sheperd*, 116 Miss. 439, 77 So. 193, 195.

Work of removing garbage under written contract, held under the particular circumstance the one removing was an independent contractor, and the health commission of the city while supervising such removal was exercising a public and not a private municipal function. *Mountain v. Fargo*, 38 N. D. 432, 166 N. W. 416, L. R. A. 1918C, 600.

Discharge of blasting powder, city held not liable. *Wilton v. Spokane*, 73 Wash. 619, 132 Pac. 404.

³¹ Where the plan is defective or the municipality directs the work to be performed in an improper manner, and by reason of either injury results to others as a direct consequence, the fact that the performance was committed to an independent contractor will not preclude municipal liability. In such relation the independent contractor is the agent of the municipality. *Julius Keller Const. Co. v. Herkless*, 59 Ind. App. 272, 109 N. E. 797, 802.

“Where the work required to be done is inherently or intrinsically dangerous, or where the necessary consequence of doing the work as specified is injury to another or where it is unlawful or involves a trespass, or where the subject-matter of the contract involves a duty, the performance of

which to predicate municipal liability in event of private injuries growing out of the performance of such work.³² Where, however, the municipality reserved no right to dictate how the work should be accomplished but could nevertheless require the work to be done and had the right of general supervision, the one doing the work occupied the position of an independent contractor.³³ For example, where a municipality let by contract the removal of garbage and the cleaning of cess pools to a sanitary contractor, and the ordinance providing therefor gave an exclusive privilege or license to him to do this character of work for the householders, and the municipality further than to see that the work was properly done, namely, in a sanitary manner, in no way attempted to supervise the details of the doing of the work, it was held that such person was an independent contractor doing the work for the benefit of the owner or occupier of the householders under the ordinance, and hence, the municipality was not liable for the negligence of his servants relating to the cleaning of a cess pool resulting in injury.³⁴

which may not be delegated by the contractee." *Julius Keller Const. Co. v. Herkless*, 59 Ind. App. 272, 109 N. E. 797, 802; citing § 2662, vol. 6, ante.

³² Sewer work under control of city inspector renders city liable. *Lobravico v. New York*, 140 N. Y. S. 161, 155 App. Div. 184.

If the contractor acts not in accordance with the contract but by instruction of a city officer in doing the act from which injury results, municipal liability arises. *Newman v. Alhambra*, 179 Cal. 42, 175 Pac. 414.

For example, where the municipality had the right to inspect and approve the material and labor, tools, appliances and methods used, and the foremen of the contractor were compelled to obey the

orders of the municipal engineer and where the municipality had the right to dismiss employes who failed to observe instructions as to carrying out the contract, and moreover where the municipality reserved the right to make alterations in the plans. The contractors were not independent contractors, but employes of the municipality within the meaning of the rule as to the doctrine of respondeat superior. In such case it is of no consequence that such control was not actually exercised by the municipality. *Hamill v. Territelli*, 195 Ill. App. 174.

³³ *Julius Keller Const. Co. v. Herkless*, 59 Ind. App. 272, 109 N. E. 797, 801.

³⁴ *Gulfport v. Shepperd*, 116 Miss. 439, 77 So. 193, 195.

Where there is a positive duty cast upon the municipal corporation it cannot escape liability by seeking to delegate the performance of such duty to an independent contractor.³⁵ An illustration is, the obligation to exercise ordinary care to keep public ways in a reasonably safe condition for public travel in the usual modes.³⁶ The principle is further illustrated where a municipality is

³⁵ Indiana. *Julius Keller Const. Co. v. Herkless*, 59 Ind. App. 272, 109 N. E. 797, 802, 803, citing § 2663, vol. 6, ante.

Kansas. *Rogers v. Coffeyville*, 95 Kan. 171, 147 Pac. 816.

New York. *Henry v. Saratoga Springs*, 155 N. Y. S. 942, 171 App. Div. 827.

Oklahoma. *Hugo v. Nance*, 39 Okla. 640, 135 Pac. 346, 348, 349.

Oregon. *Hosford Transp. Co. v. Portland*, 70 Or. 366, 141 Pac. 1016.

Washington. *Kaler v. Puget Sound Bridge, etc., Co.*, 72 Wash. 497, 130 Pac. 894.

³⁶ *Baltimore v. Leonard*, 129 Md. 621, 99 Atl. 891.

Delay in sewer construction, obstructing street interfering with access of abutter. *Cassel v. New York*, 153 N. Y. S. 410, 167 App. Div. 831.

A street was being improved. Contractor failed to maintain lights and barriers; held city liable. Duty to keep streets, in reasonably safe condition. "This duty it can neither delegate nor avoid." *Schlinski v. St. Joseph*, 170 Mo. App. 380, 156 S. W. 823, 826.

Damage to adjoining property due to the collection of water pools because of negligence of the contractor in surfacing the street, after the work has been accepted by the city, creates municipal liability. "An independent contrac-

tor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work." *White v. Springfield*, 189 Mo. App. 228, 173 S. W. 1090, 1092.

"Where the city has authorized the placing of obstructions in the street, notice to the city is not necessary to render it liable." Everything done in pursuance of permission the city is to take notice of, etc. *Schlinski v. St. Joseph*, 170 Mo. 380, 156 S. W. 823, 826.

If a municipality authorized work to be done, or a part of a street to be obstructed while the work is going on, it must take notice of the obstructions which it has authorized, and see that the highway is kept reasonably safe, but it is not required to anticipate that the person receiving the permit will exceed his authority, e. g., authority to an independent contractor to put his cement on a grass plot, does not require the city to anticipate that he would put brick on the pavement. If brick had not been on the sidewalk a sufficient length of time to charge the city with constructive notice thereof, an injury due thereto, creates no municipal liability. *Bellevue v. Rentz*, 152 Ky. 426, 153 S. W. 732.

engaged under legislative or charter authority in the business of furnishing electric lighting to private consumers for profit, in which case it is liable for the negligence of the agents employed by it to string the wires designed for such commercial purposes. This, of course, is an exception to the general rule.³⁷ Work inherently or intrinsically dangerous per se cannot by the delegation

³⁷ *Ellas v. New Iberia*, 137 La. 691, 69 So. 141.

"The reason for this exception to the general rule is that the privileges enjoyed under a corporate franchise and the duties incidental thereto are correlative and cannot be divorced at the will of the corporation or by its act. Hence, where there can be no independence that would result in such a divorce the independent contractor doctrine has no application." This case is analagous to that of the fellow servant doctrine which has no application where the master delegates to a fellow servant the performance of a duty the master himself owes to his servant. (*Laragay v. East Jersey Pipe Co.*, 77 N. J. L. 516, 72 Atl. 57). The essential ground, therefore, of the exception we are considering is the existence of a duty inherent in the nature of the undertaking, authorized by charter or franchise under which alone such undertaking may lawfully be prosecuted. "Where an owner or occupier of land may do as he likes, he may act through an independent contractor, for here the exception does not apply. Such a case was *Jansen v. Jersey City*, 61 N. J. L. 243, 39 Atl. 1025, where the municipality was erecting a city hall on land owned by the city. So a railroad company

owning its right of way may cause an independent contractor to construct its roadbed thereon. Such a case was *Cuff v. Newark & N. Y. R. R. Co.*, 35 N. J. L. 574, but not so where the rails are laid in a public highway, for this can lawfully be done only by governmental grant or franchise. But in neither case could the carrier escape liability in the operation of its roadbed by contracting for such operation with an independent contractor, for that is the performance of a charter right. Where the exception under consideration applies, one who would, under the general doctrine, be an independent contractor becomes in law the agent of the contracting party. In the present case the negligence, if any, occurred in the performance of work that could be lawfully done only in the performance of the franchise or charter rights of the defendant, hence under the exception to the general rule stated the defendant cannot escape liability by delegating the doing of such work to an independent contractor. Such a contractor, under the rule stated, was the agent of the defendant, for whose negligence the defendant is responsible." *Karpinski v. South River Borough*, 85 N. J. L. 208, 88 Atl. 1073, per *Garrison, J.*

of its performance by the municipality to others exempt it from liability for private injuries resulting from the negligent performance of such work.³⁸

§ 2664. Same—agreement with contractor as to liability.³⁹

IV. LIABILITY FOR ACTS OF PARTICULAR OFFICERS.

§ 2665. Duty as to employing "competent" servants.⁴⁰

§ 2666. Police officers.

As to police officers exercising governmental functions the general rule is that there is no municipal liability for

³⁸ *Sroka v. Halliday*, 39 R. I. 119, 97 Atl. 965, 973; *Nemet v. Kenosha*, 169 Wis. 379, 172 N. W. 711.

Public sewer, blasting for excavation, producing vibrations, damaging building. Both city and independent contractor may be liable. *Taylor v. Walsh*, 193 Mo. App. 516, 186 S. W. 527.

Contractor was digging trenches in the street for water mains and was using dynamite. "The city authorities knew that explosives were necessary and were actually being used in the prosecution of the work. It was its positive duty to exercise reasonable care not only to avoid negligent use but negligent abandonment of the explosives upon the streets during the progress of the work. It was not only under the general duty to keep its streets free from avoidable danger reasonably to be anticipated, but it was also under the same duty to safeguard explosives used by its agents and employees upon the streets as that incumbent upon private persons relative to their own

premises under the same conditions." The action was for injury sustained by an eleven year old boy through the explosion of a dynamite cap. The city was held liable. *Davis v. Wenatchee*, 86 Wash. 13, 149 Pac. 337, relying on *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807.

³⁹ *Heman Const. Co. v. St. Louis*, 256 Mo. 332, 165 S. W. 1032; *Richmond v. Jackson*, 118 Va. 674, 88 S. E. 49; *Aberdeen Const. Co. v. Aberdeen*, 84 Wash. 429, 147 Pac. 2.

⁴⁰ The fact that the mayor or city officials charged with the appointment of police officers are negligent in making appointments or knowingly appoint a dangerous man does not create municipal liability for the appointment of a police officer of violent temper and vicious propensities, who assaults one on the street. *Lamont v. Stavannah*, 129 Minn. 321, 152 N. W. 720, L. R. A. 1915E, 460.

No municipal liability for injuries due to neglect, incompetence, or wrongful act of servants and employees touching sanitary regula-

injuries due to their acts or omission to act in the performance of their public duties.⁴¹ Conceding this gen-

tions, arises since such functions are governmental, etc. *Howard v. Philadelphia*, 250 Pa. 184, 95 Atl. 388, holding a city not liable for the negligence of a physician employed by a board of health in a vaccination case resulting in the loss of a limb.

⁴¹ Section 2431, ante; § 2431, vol. 5, ante.

A municipality is not liable for the wrongful acts of police officers in enforcement of ordinances. *McConnell v. St. Charles (Mo.)*, 204 S. W. 1075.

There is no municipal liability for assaults, trespasses or negligent acts of policemen. *Lawton v. Harkins*, 34 Okl. 545, 126 Pac. 727.

No municipal liability exists for using unnecessary force by a police officer in making an arrest. In such case the officer alone is liable. *Mollnow v. Rafter*, 152 N. Y. S. 110, 89 Misc. Rep. 495.

Unauthorized arrest by police officer of one without a warrant, in the absence of an emergency justifying such arrest, does not create municipal liability, but the officer is liable. *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391.

No municipal liability arises from the wrongful assault of a police officer, notwithstanding the officials who appointed him knew him to be a man of violent temper and vicious propensities. *Lamont v. Stavannah*, 129 Minn. 321, 152 N. W. 720, L. R. A. 1915E, 460.

No municipal liability grows out

of the negligence of the driver of a patrol wagon or on account of defects in the wagon. *Stater v. Joplin*, 189 Mo. App. 383, 176 S. W. 241, citing §§ 2431, 2432, vol. 5, ante.

"It is not disputed that a policeman in the performance of his duties is a governmental agent and that his negligence and carelessness while acting in that capacity cannot give rise to an action in damages *ex delicto* against the municipal corporation which employs him." *Jones v. New Orleans*, 143 La. 1073, 79 So. 865.

Omission of police superintendent to secure the usual bond from a police officer before such officer was assigned to duty was held to be the omission to perform a governmental function, and such failure was held not to create any municipal liability to one wrongfully injured by such policeman in the discharge of his duties. *Looney v. Sioux City*, 163 Ia. 604, 145 N. W. 287.

A municipality is not liable in damages *ex delicto* for a tort committed by its police officers while apparently acting in the discharge of their duties. "That question is no longer an open one. Police officers, though employed by a municipal corporation, exercise a function which is governmental in its nature and not corporate, and in the absence of positive statute to the contrary, cannot by their tortious acts, render the municipality which employs them liable in damages *ex delicto*." *Joliff v. Shreve-*

eral proposition, a late Alabama decision adds: "Yet where the duty to remedy defects or report the same to an officer with authority to act is imposed on officers who in other respects discharge governmental powers, in respect to the special duty so imposed, they are the mere ministerial agents of the municipality, which therein is deemed to act, and is answerable, in its corporate capacity rather than as an arm of the state."⁴² On the other hand, a municipality is not exempt from liability for every act of a policeman simply because he is such.⁴³ A municipality is liable for the negligence of the driver of one of its automobiles (who was not a policeman) engaged in hauling policemen to their beats in outlying districts. Such act does not relate to the enforcement of the law. "Such matters partake of the general or corporate business of the city."⁴⁴

§ 2669. Health officers.

In the conservation of the public health in the various methods usually employed, municipal officers act in a strictly governmental capacity, in accordance with the uniform course of judicial judgments, and hence, no municipal liability for injury due to the negligent performance of such function can arise.⁴⁵ The rule has often

port, 144 La. 62, 80 So. 200, per Leche, J.

⁴² *Birmingham v. McKinnon* (Ala.), 75 So. 487.

⁴³ Section 2431, vol. 5, ante.

⁴⁴ *Jones v. Sioux City* (Ia. 1919), 170 N. W. 445, 449.

⁴⁵ *Butler v. Kansas City*, 97 Kan. 239, 241, 242, 155 Pac. 12 (quoting with approval part of § 2669, vol. 6, ante); *Coates v. District of Columbia*, 42 App. D. C. 194.

To be relieved from the restrictions of quarantine regulations because of small-pox in the district in which plaintiff resided he submitted to vaccination by a phy-

sician employed by the board of health without expense to himself. His vaccination was negligently performed which resulted in the amputation of one of his limbs. He brought action against the city for damages. It was held that there was no liability. "The one distinctive ground of which the court below rested its conclusion was that by general rule municipalities are exempt from liability for the negligent acts of their officers and agents, except in case where the negligence occurs in the performance of some duty which has been imposed by law upon

been applied to the removal of garbage, filth and the like

the municipality. The rule as thus stated by the court, while correct as far as it goes leaves somewhat **to be supplied**, because of its conciseness. If we add to it that, in order to constitute an exception to the rule, the duties so imposed must be imperative, and not discretionary, so as to make clear the distinction between duty and authority or power, and, further, that the duty must relate to the municipality's public or governmental functions, as distinguished from its private or corporate functions or duties, the rule as thus stated is one which has always been recognized in our own state, and obtains in most, if not in all, the other states. The law sometimes imposes duties on municipalities which are legislative or judicial in their character, and therefore are discretionary. It is only with respect to the performance of these that no liability attached. With respect to those duties which are absolute and perfect no exemption can be claimed for negligence in their performance. * * * It is not pretended that in the present case what the city here did was in discharge of a positive and imperative duty imposed on it by law." *Howard v. Philadelphia*, 250 Pa. 184, 95 Atl. 388.

A hospital was managed by the city for the sole purpose of preserving and treating persons afflicted with the contagious disease of small pox. While excavating for the water and sewer systems, rocks were encountered which it

was necessary to remove by blasting. Certain dynamite caps were left on the ground about the hospital. A child going to the hospital with a parent removed there for treatment was playing about the yard and one of the dynamite caps exploded. Held, there was no municipal liability. The duty of maintaining the hospital was governmental. "The plaintiff cites authorities in which it is said that after legislative judgment and discretion have been exercised and nothing remains but ministerial execution of work which has been laid out, a city may be liable for negligence in the conduct of such work. The statement is unobjectionable as a statement of principle, if confined in its application to its proper sphere. If the work be undertaken in the exercise of purely governmental power, performance of the work will also involve the exercise of governmental power. In a certain sense maintenance of a park, or a jail, or a detention hospital may involve the discharge of ministerial duties but such duties are none the less governmental in character." *Frost v. Topeka*, 98 Kan. 636, 161 Pac. 936.

Patient in hospital managed by the city may not maintain an action for injuries due to scalding by negligence of a nurse, as conducting hospital is governmental function. *Bowder v. Henderson*, 182 Ky. 771, 207 S. W. 479.

Sewers. The maintenance of the sewerage and drainage system of a city in a good working and

from the streets, public places and private premises,⁴⁶ provided, however, that in the discharge of such duty no nuisance is created.⁴⁷ Private injury due to a nuisance created in doing such work may result in municipal liability,⁴⁸ and in removing garbage and in cleaning sewers liability for injuries may arise due to the creation of dangerous obstructions in public ways, which would constitute failure to exercise ordinary care to keep the

sanitary condition is a governmental function. *Augusta v. Cleveland*, 148 Ga. 734, 98 S. E. 345, 347, 98 S. E. 7381, citing § 2669, vol. 6, ante.

⁴⁶ The city acts in a governmental capacity in removing garbage. Hence, no municipal liability is created when one receives an injury from the striking by a municipal garbage wagon of a ladder on which the injured person was working. *Behrmann v. St. Louis*, 273 Mo. 578, 201 S. W. 547.

In disposing of its garbage and in letting a contract therefor a municipality acts in its governmental, and not in its private or corporate capacity. "There is only one purpose for our municipalities entering so largely into this work as they do today and that is the preservation of the public health and in every enlightened land this aid and protection always has been and always will be considered a primary duty which devolves upon the state in its sovereign power." *Mountain v. Fargo*, 38 N. D. 432, 166 N. W. 416, L. R. A. 1918C, 600, per Bruce, C. J.

⁴⁷ "The gathering up off the streets and the premises of private persons of garbage, filth and the like, the accumulation of which

would menace the public health, is a governmental duty and when the city authorities assume to discharge such duty the corporation is not liable for the negligence of its servants in so doing. But this statement must be qualified by the previous announcements of this court in *Kolb v. Knoxville* (111 Tenn. 311, 76 S. W. 823) and *Knoxville v. Klasing* (111 Tenn. 134, 76 S. W. 814) to the effect that although in the discharge of a governmental duty it must not commit a nuisance." *Nashville v. Mason*, 137 Tenn. 169, 192 S. W. 915, L. R. A. 1917C, 914.

⁴⁸ "Although municipal authorities may have plenary power in the matter of collection, removal and disposition of garbage, yet they cannot lawfully create, in connection therewith, a nuisance dangerous to health or life; and where such a nuisance is created and its effect is injurious to an individual by reason of its proximity to his home he may have a cause of action for damages. *Bell v. Savannah*, 139 Ga. 298, 77 S. E. 165." *Kea v. Dublin*, 145 Ga. 511, 89 S. E. 484; *Dulbin v. Kea*, 20 Ga. App. 718, 93 S. E. 229.

See § 2641, ante; § 2641, vol. 6, ante.

streets and sidewalks in a reasonably safe condition for public travel.⁴⁹

V. PROPERTY OWNED BY MUNICIPALITY.

§ 2672. In general.⁵⁰

§ 2673. Conducting business for profit.⁵¹

§ 2674. Municipal buildings.⁵²

Where a municipality by statutory authority erects and

⁴⁹ Garbage can was left by street department on a sidewalk for three days, and plaintiff, a boy, on his way home from a grocery store, in a drizzling rain, stumbled over it and fell. Point that city was engaged in a governmental function in gathering up the garbage placed in the cans was denied. "In failing to remove this garbage when it should have done so the city was not exercising any governmental function. It was simply guilty of negligence as much so as if a man in the employ of the city whose duty it was to remove the garbage had himself put an obstruction on the sidewalk at this place and let it remain there three days." The liability as stated by the court, grew out of the failure to exercise ordinary care to keep the sidewalk in reasonably safe condition for public travel. *Louisville v. Hans*, 167 Ky. 160, 180 S. W. 65.

City employees, paid by the city and not by the health board who in opening the sewer to clean it left the iron lid on a sidewalk so as to create a dangerous obstruction causing injury. The city was held liable. *Augusta v. Cleveland* (Ga. App.), 98 S. E. 738, 148 Ga. 734, 98 S. E. 345.

⁵⁰ Injury from use of a brick pump house. *Shawnee v. Cheek*, 41 Okl. 227, 137 Pac. 724.

A municipality is held to be not liable for injury due to any defect or want of repair of public property devoted to municipal purposes, nor is it liable for the negligent management of such property by its officers, servants or agents. This is so because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general law upon all municipalities alike, from the performance of which it derives no compensation. But when a city or town does not devote such building exclusively to municipal uses, but lets it or part of it for its own advantage or emolument and receives rents or otherwise, it is liable while it is so let in the same manner as a private owner would be. *Davis v. Rockport*, 213 Mass. 279, 100 N. E. 612, 43 L. R. A. (N. S.) 1139, quoting with approval from *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185.

⁵¹ *Karpinski v. South River Borough*, 85 N. J. L. 208, 88 Atl. 1073.

⁵² Building of health department, governmental; no liability. *Gold-*

maintains an auditorium, not for governmental purposes, but of which it has full charge, and lets it out or refuses to let it out at its pleasure, and rents it for various classes of entertainments which the public generally attend, or may do so, if persons attending an entertainment are injured by reason of the giving away or collapsing of an approach to the auditorium which is partly over a bay, it is held, the municipality will be liable in damages in like manner as if the building had been owned by an individual or a private corporation.⁵³

§ 2675. Same—schools.⁵⁴

§ 2676. Public market places and buildings.

Judicial decisions declare, without dissent, that a municipality is liable for injury due to its negligence in operating a market house,⁵⁵ or a city or municipal market

farb v. New York, 178 N. Y. S. 541.

Death of one while engaged in repairing an air cushion in an elevator shaft in a building owned and in charge of city. Want of care of deceased defeated the action. *Wise v. Philadelphia*, 239 Pa. 392, 86 Atl. 862.

In building and maintaining a court house a municipality acts in a governmental rather than in a private capacity. *D'Orsi v. New York*, 171 N. Y. S. 203, 104 Misc. Rep. 66.

In maintaining its municipal courts the city acts in its governmental capacity, and is not liable for negligence resulting in injury. *Schlegel v. New York*, 152 N. Y. S. 975, 90 Misc. Rep. 285.

Collapse of wall of engine house in course of construction; distinguishing between negligence and maintaining a nuisance. *Herman*

v. Buffalo, 214 N. Y. 316, 108 N. E. 451, reversing 143 N. Y. S. 205, 157 App. Div. 819.

⁵³*Chafor v. Long Beach*, 174 Cal. 478, 163 Pac. 670, 672.

⁵⁴*Daniels v. Grand Rapids B'd of Education*, 191 Mich. 339, 158 N. W. 23; *Titusville Iron Co. v. New York*, 207 N. Y. 203, 100 N. E. 806, reversing 128 N. Y. S. 1147, 144 App. Div. 893; *Seel v. New York*, 167 N. Y. S. 61, 175 App. Div. 659.

⁵⁵*Spalding v. Ziegler*, 173 Mo. App. 698, 160 S. W. 14.

Negligently maintaining a ladder near the entrance to the market which fell on plaintiff. *Spalding v. Ziegler*, 173 Mo. App. 698, 160 S. W. 14.

Market woman at her stand in a public market under bridge was struck by an iron plate that fell from the bridge which had been dropped by an employee of the

for profit.⁵⁶ In this relation the municipality acts in its proprietary capacity.

§ 2677. Wharves, piers, etc.⁵⁷

Where a city maintains a wharf and charges wharfage for the use thereof, negligence relating thereto, resulting in injury, may create municipal liability.⁵⁸

bridge department working on the bridge. City failed to rebut the presumption of negligence from the happening of the accident, and a judgment dismissing the complaint was reversed. *Fisher v. New York*, 157 N. Y. S. 287, 93 Misc. Rep. 481.

⁵⁶ "The rule with respect to public building, where operated for profit, and in the exercise of which operation the city is performing a ministerial duty, is that the duty devolves upon the city to use the same care that is required of a prior owner with respect to invitees upon the premises, which duty is to use due and reasonable care to see that the premises are safe for the purposes of the visit of those invited thereon." *Norfolk v. Anthony*, 117 Va. 777, 86 S. E. 68.

⁵⁷ No municipal liability arises for injury due to the negligence of the owner of a private wharf because of the fact that an ordinance created a water front committee and gave such committee general supervision of all wharves within the corporate limits. *Rusk v. Montgomery*, 80 Or. 93, 156 Pac. 435.

City maintained a floating public wharf used for the landing of launches and other small water craft consisting of two floats, held in place by piles, so as to permit their rising and falling with the

tide. The floats were some eighteen inches apart. At night time plaintiff, an operator of a launch for hire, in passing over the floating wharf fell between the floats. Questions of municipal negligence and contributory negligence, were held to be of fact. *Harris v. Bremerton*, 85 Wash. 64, 147 Pac. 638.

Action for injury due to fall on floor of a municipal dock building owned by the city. "In its care of the building the city did not owe to the public that high degree of care imposed upon carriers of passengers. Its duty in this respect was performed if it exercised reasonable and ordinary care and diligence in keeping the building in repair, the same degree of care that is imposed upon a city with reference to its streets and other public places open to the use of the public. * * * Rules governing the imperative duties of cities with regard to keeping its streets and buildings in repair must be reasonable and practicable rules, else the burden of supporting the government therein will necessitate an abandonment of all government." *Belles v. Tacoma*, 79 Wash. 200, 140 Pac. 324.

⁵⁸ *Savannah v. Harmon*, 20 Ga. App. 395, 93 S. E. 41.

Liability of board of commis-

§ 2678. Parks.

The late cases, as the earlier ones, present conflict as to the question whether the municipal corporation in the maintenance of parks as places of recreation and resorts for the people is discharging a public or governmental duty or a duty purely proprietary and ministerial. In Tennessee such duty is public, "based upon the obligation of the municipality as a branch of the state government, to guard and preserve and maintain the public health."⁵⁹ It is so in Wisconsin,⁶⁰ and California.⁶¹ And in Washington the doctrine obtains that the operation or improvement of a park, not for profit, is the exercise of a governmental function.⁶² A like doctrine, it seems, prevails in Kansas.⁶³ In Georgia the maintenance of a park by a

sioners of the port of New Orleans denied. *Lamport & Holt v. New Orleans Board, etc.*, 137 La. 784, 69 So. 174.

Municipal liability denied in a given case for the capsizing of a barge in harbor. *The Imp*, 225 Fed. 668.

⁵⁹ *Nashville v. Burns*, 131 Tenn. 281, 174 S. W. 1111.

⁶⁰ *Nemet v. Kenosha*, 169 Wis. 379, 172 N. W. 711; *Bernstein v. Milwaukee*, 158 Wis. 576, 149 N. W. 382, L. R. A. 1915C, 435.

⁶¹ Governmental function (*dicta*) *Kellar v. Los Angeles*, 179 Cal. 605, 178 Pac. 505, 507, approving *Harper v. Topeka*, 92 Kan. 11, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032.

⁶² A city erected a dam within a public park which it owned and controlled across a stream of running water. The dam was so negligently constructed that it obstructed the stream to the damage of private property. "This court has held that the liability of a city for acts such as the one

here complained of depends upon whether the negligence was in respect to governmental or proprietary functions. We are committed to the doctrine that in respect to governmental functions cities are not liable for those negligent acts.

* * * We are committed by the decisions of this court to the doctrine that the operation or improvement of a park not for profit is the exercise of a governmental function." *Nelson v. Spokane*, 104 Wash. 219, 176 Pac. 149.

⁶³ *Harper v. Topeka*, 92 Kan. 11, 139 Pac. 1018, L. R. A. (N. S.) 1032.

The city maintained a public park in which were located a number of buildings where wild animals were kept. A child visiting the park with its parents approached a cage containing coyotes and put her hand and arm in the wires of the cage which one of the coyotes seized and scratched, etc., held there was no municipal liability since the maintenance of

municipality is held to be a governmental function, although a purely incidental profit might result from its management, but if the park is maintained primarily as a source of revenue the duty of the municipality to maintain it in a safe condition is viewed as ministerial and municipal liability may arise in case of injury from the negligent performance of such duty.⁶⁴ In Nebraska, it appears, the maintenance of parks by cities and towns is a governmental function, irrespective of the fact that a small revenue may arise from the diversions therein provided.⁶⁵ In Massachusetts liability may be imposed only by statute.⁶⁶

On the other hand, in many states the management of a public park, owned by and in the exclusive control of the municipality, is regarded as a corporate duty, and negligence resulting in private injuries growing out of the management thereof may be a ground of liability.⁶⁷

zoological garden in the park was a governmental function. *Hibbard v. Wichita*, 98 Kan. 498, 159 Pac. 399, L. R. A. 1917A, 399.

⁶⁴ *Cornelisen v. Atlanta*, 146 Ga. 416, 91 S. E. 415; 19 Ga. App. 436, 91 S. E. 510.

⁶⁵ A city maintained a bathing beach in park. One bathing and in diving struck the bottom where the water was shallow and broke his neck. Creating a dangerous place was the negligence charged. A city in maintaining a park performs a governmental duty. "Health, comfort, recreating, sanitary conditions and better environments, resulting in order, happiness and increased usefulness from a public standpoint are governmental aims in the maintenance of a public park or a municipal beach." Fact a small revenue is derived from the rental of city buildings used in connection with the public

park or municipal beach is of no consequence. *Caughlan v. Omaha* (Neb.), 174 N. W. 220; *Kellar v. Los Angeles*, 179 Cal. 605, 178 Pac. 505.

⁶⁶ Park commissioners, held not liable for defects in park boulevard causing injury in absence of a statute imposing it. *Gero v. Metropolitan Park Comrs.*, 232 Mass. 389, 122 N. E. 415.

⁶⁷ Exercise of proprietary function. *Capp v. St. Louis*, 251 Mo. 345, 158 S. W. 616, 46 L. R. A. (N. S.) 731, Ann. Cas. 1915C, 245. Proprietary in managing park. In maintaining order, etc., in park duty is governmental. Celebrating 4th of July in a public park, including a sham battle, held not a nuisance. *Healy v. Kansas City*, 277 Mo. 619, 211 S. W. 59, 61.

Where a park is the property of the city and in the exclusive control of park commissioners ap-

The liability, it has been stated, may be based on the

pointed by its authority, the commissioners are municipal officers, and their failure to exercise reasonable care in maintaining devices therein as a merry-go-round in a reasonably safe condition, may create municipal liability, for injuries. *Canon City v. Cox*, 55 Colo. 264, 133 Pac. 1040, 1042, approving *Denver v. Spencer*, 34 Colo. 270, 82 Pac. 590, 2 L. R. A. (N. S.) 147, 114 Am. St. Rep. 158.

City may be liable for injury due to its negligence in keeping Shetland ponies for children to ride, etc. *Longwell v. Kansas City*, 199 Mo. App. 480, 203 S. W. 657.

City must keep parks safe for immature, unprotected and indiscreet children. Here, unguarded pool of water in which a boy was drowned. *Capp v. St. Louis*, 251 Mo. 345, 158 S. W. 616, 46 L. R. A. (N. S.) 731.

Boy playing game in park, which was forbidden, fell from retaining wall and was injured. Held, playing game was no defense, and whether city was negligent was jury question. *Barnett v. Kansas City* (Mo. App.), 214 S. W. 240.

In providing a pavilion furnished with a rest room and ladies toilet room in its public park, a municipality does not act in its governmental capacity. *Kuenzel v. St. Louis* (Mo. 1919), 212 S. W. 876.

No municipal liability for drowning of child in swimming pool, (where there is no evidence as to how it occurred) in park. *Heino v. Grand Rapids*, 202 Mich. 363, 168 N. W. 512.

Artificial pond used to operate a hydraulic ram to flush water for toilets for the convenience of the employees engaged in the park department, upon which was a raft from which a boy fell and was drowned. In sustaining a demurrer to a petition for damages for the boy's death, the court said: "It is a part of a boy's nature in these venturesome sports, and a city can be no more held for negligence in maintaining this artificial pond, unfenced and unguarded with the raft thereon, than it could for leaving the river front exposed. The possibility of a child being drowned in this pond was as patent to the parents as to the city. The path of the child is always beset with danger, and this pond is one of those dangers to which childhood has ever been exposed. From the facts stated in the petition it does not appear that the pond and raft constituted an attractive nuisance." *Robbins v. Omaha*, 100 Neb. 439, 160 N. W. 749.

Permitting to be maintained a base ball ground upon a public park, and allowing the game to be played without suitable screens, guards, etc., whereby one watching a game was struck by a foul ball and injured, creates no municipal liability. The game was not for profit, the games were merely amateur affairs, and the village officers merely acquiesced in the common custom of the community to make a playground of the park. *Braun v. Hudson Falls*, 155 N. Y. S. 796, 169 App. Div. 874.

Negligence in placing structure

theory that where a power is given and a duty imposed, a corresponding liability arises for the proper exercise thereof, and sometimes an analogy between parks and streets in this respect is drawn.⁶⁸ Liability for injuries on park roads and ways may sometimes rest on the same ground as the liability for defective streets or sidewalks.⁶⁹

for basket ball in corner of public playground. *Gorbman v. New York*, 164 N. Y. S. 59.

⁶⁸ A municipality held liable to an employee of a park board for injury due to discharge of a cannon when such employee undertook to withdraw the charge by direction of his superior the park superintendent, etc. The park board was created by the council by authority of statute and was under full control of city. "Although no case has been decided in this state which determines the liability of a city for neglect in the management of a park, the same reason which affirms a city's liability in respect to its streets are present in the consideration of such city's liability in respect to the management of a park. * * * The liability of a city in this state for the proper maintenance of a park may thus be consistently placed upon the theory that where a power is given and a duty imposed a corresponding liability arises for the proper exercise thereof, and an analogy can be drawn between parks and streets in this regard." *Kokomo v. Loy*, 185 Ind. 18, 112 N. E. 994, 997, followed in *Sarber v. Indianapolis* (Ind. App. 1920), 126 N. E. 330.

⁶⁹ Obstruction on park road caused by fallen trees, held liability a jury question. *Rockett v.*

Philadelphia, 256 Pa. 347, 100 Atl. 826.

Injury due to defective stairs in park. "Public squares and commons," in a statute charging cities with the care of, and which were to be kept open and in repair and free from nuisance, held to include "parks." *Woodward v. Des Moines*, 182 Ia. 1102, 165 N. W. 313.

Municipality held liable for injury due to a defective sidewalk in a public park, where it had the power and was subject to the duty to keep all highways within the municipal area in a reasonably safe condition, etc. "The general rule in Pennsylvania is, that a municipal corporation having the power and subject to the duty to maintain the highways within it, is chargeable with the consequences of the presence of an actual and unlawful obstruction or negligent defect in that portion of a highway within its limits which the general public is invited to travel, at least as soon as it can be said to have knowledge of the obstruction or defect. * * * The fact that a highway in a municipality is within or passes through an uninclosed park does not change the rule." *Ankenbrand v. Philadelphia*, 52 Pa. Super. Ct. 581, 584, following *Weber v. Harrisburg*, 216 Pa. 117, 64 Atl. 905.

§ 2680. Public ownership of water or light plant.

In the operation of a public utility for profit the municipal corporation does not act in its governmental capac-

Injury due to fall on a defective park pathway not constructed by the city for the use of the public, but a pathway worn in the grass by certain railway employees, creates no municipal liability. *Sowers v. Philadelphia*, 63 Pa. Super. Ct. 227, distinguishing *Weber v. Harrisburg*, 216 Pa. 117, 64 Atl. 905, and *Ankenbrand v. Philadelphia*, 52 Pa. Super. Ct. 581.

A city is not required by law to keep every part of a public park safe for public travel. "Certain parts of a public park should be kept in a safe condition for public travel, but there often are in such parks, ponds, lakes, knolls, ravines and forests not intended and not understood by the public to be intended for public travel; and machinery and appliances with which a park is kept in order may very reasonably be stored in some part thereof." *Holt v. Moline*, 196 Ill. App. 235, 237.

Walks and foot paths existed through a public park which were in constant use as thoroughfares by people passing from one part of the city to another. Employees of the park collected rubbish and burned it in a pile, and a pile of such rubbish burning was left at the section of walks in the park, and a child walking with its mother stumbled and fell into this pile of ashes and burned its hands suffering injury, etc. After considering the exception to the rule as to non-liability of a municipality

in acting in its governmental capacity, as applied to streets and public ways, the court said: "The exception, whether logical or otherwise, is now too firmly established to be questioned, and our present concern is to determine whether the case at bar is controlled by the exception or by the general rule. On examining the grounds upon which the liability is imposed for defects in streets, we find that the same grounds exist for imposing liability for defects in the walks and pathways in question. These walks and pathways were used not merely for purposes of pleasure and recreation, but as thoroughfares for passing from one part of the city to another. They differ from other walks provided by the city for the use of pedestrians only in the fact that they were within the limits of a park. We find no substantial distinction between such walks and those located along the public streets. When we turn to the decided cases we find a diversity of opinion. The New England states, as well as some others, do not recognize the exception to the general rule which we have been considering, and hold that a city is not liable for defects in its streets unless such liability is expressly imposed by statute, and, also hold that it is not liable for defects in the paths and ways traversing its parks. Most of the cases cited by defendant are from states where such is the rule, and

ity, but is subject to the same rules and duties as govern and devolve upon a private corporation, co-partnership or an individual engaged in such business.⁷⁰

lack cogency in states which have adopted that a city is liable for negligence in respect to its streets, but is not liable for negligence in respect to its parks. * * * Other courts hold that it is also liable for negligence in respect to its parks. * * * We find no sufficient ground for making a distinction between the walks and pathways in question and the ordinary sidewalks provided by the city for the use of pedestrians, and hold that the city is liable for dangerous conditions therein caused by its own employees." *Ackeret v. Minneapolis*, 129 Minn. 190, 151 N. W. 976, 978.

⁷⁰ *Asher v. Independence*, 177 Mo. App. 1, 7, 163 S. W. 574.

Waterworks—Kentucky. *Flutmus v. Newport*, 175 Ky. 817, 194 S. W. 1039 (quoting with approval part of section 2680, vol. 6, ante).

Massachusetts. *Murray v. Boston*, 219 Mass. 501, 107 N. E. 416.

Nebraska. *Henry v. Lincoln*, 93 Neb. 331, 140 N. W. 664.

Oregon. *Coleman v. LaGrande*, 73 Or. 521, 144 Pac. 468.

Washington. *Bjork v. Tacoma*, 76 Wash. 225, 135 Pac. 1005; *Seattle & Puget Sound Packing Co. v. Seattle*, 72 Wash. 359, 130 Pac. 493.

Light cases—Georgia. *Dublin v. Ogburn*, 142 Ga. 840, 83 S. E. 939; *Lord v. Atlanta*, 17 Ga. App. 113, 86 S. E. 388.

Louisiana. *Ellas v. New Iberia*, 137 La. 691, 69 So. 141.

Minnesota. *Brantman v. Canby*,

119 Minn. 396, 138 N. W. 671.

Missouri. *Thompson v. Slater*, 197 Mo. App. 247, 193 S. W. 971; *Williams v. Fulton*, 177 Mo. App. 177; *Wilhite v. Huntsville*, 167 Mo. App. 155.

New Jersey. *Karpinski v. South River Borough*, 85 N. J. L. 208, 88 Atl. 1073.

N. Carolina. *Monds v. Dunn*, 163 N. C. 108, 79 S. E. 303; *Smith v. Lexington Board of Comrs.*, 176 N. C. 466, 97 S. E. 378.

Oklahoma. *Oklahoma City v. Hoke* (Okl.), 182 Pac. 692, 695, citing § 1801, vol. 4, ante and § 2625, vol. 6, ante.

Texas. *Greenville v. Branch* (Tex. Civ. App.), 152 S. W. 478, 486.

Wisconsin. *Nemet v. Kenosha* (Wis. 1919), 172 N. W. 711.

"When a municipal corporation undertakes commercial enterprises it should do so under the same responsibilities that attach to any private corporation engaged in the same line." *Powers v. Mechanicsville*, 148 N. Y. S. 452, 455, 163 App. Div. 138.

"In the construction and operation of electric and water works for profit the city occupies the same situation as a private corporation organized to buy or sell and get gain, and in the same manner as an individual it is liable both at law and in equity for its trespasses upon and violation of individual rights." *Stephens v. Eugene*, 90 Or. 167, 175 Pac. 855.

"When a municipality engages

Water. It has been repeatedly held in the application of the well-settled distinction between public and private functions, that "the establishment and maintenance of a system of water supply in part for the use of inhabitants who pay for the necessity thus supplied is a commercial venture, and that for negligence in connection therewith the city or town is liable as a private corporation would be in performing a similar service."⁷¹ Thus a waterworks system owned and operated by a municipality renders the city liable for negligent management thereof resulting in injury, and this is true, it has been held, where damage resulted from the bursting of a water main due to negligence of the city's servants, notwithstanding such

in the business of furnishing electricity, lights, water, etc., to the public, it is not then discharging or exercising governmental functions or powers, but is, quoad hoc, exercising proprietary or business powers, and as to such business it is governed by the same rules of law which are applicable to ordinary business corporations engaged in like businesses." *Athens v. Miller*, 190 Ala. 82, 66 So. 702, 705.

⁷¹ *Pearl v. Revere*, 219 Mass. 604, 107 N. E. 417, per Rugg, C. J.

"A system of waterworks operated for profit by a city belongs to the municipality in its private rather than in its public or governmental character and the city is liable as a private proprietor would be for the negligent construction or maintenance thereof." *Pacific Paper Co. v. Portland*, 68 Or. 120, 135 Pac. 871.

"When a municipal corporation undertakes to construct and operate a filtration plant for the purpose of supplying water to its inhabitants, it is exercising a busi-

ness as distinguished from a governmental function, and the maxim *respondet superior* applies to the cast of its officers and agents in exercising such function." *Armstrong & Latta v. Philadelphia*, 249 Pa. 39, 94 Atl. 455, 457.

Rule applies to a territorial subdivision supplying water declared by statute as a public municipal corporation. *Woodward v. Livermore Falls Water Dist.*, 116 Me. 86, 100 Atl. 317, L. R. A., 1917D, 678.

Right of city to take water from land owned by it by means of wells, considered as an interference with the rights of adjoining landowners. *Schenk v. Ann Arbor*, 196 Mich. 75, 163 N. W. 109.

If a city in obtaining water by its power plant from a river injures the land of a riparian owner it is liable as a private corporation or individual. *Stephens v. Eugene*, 90 Or. 167, 175, Pac. 855.

Liability for insufficient water supply. Section 1801, ante; § 1801, vol. 4 ante.

main was used for fire protection, where it appeared the fire department had no control over the waterworks system. Nor does it change the liability in the least although a portion of the water is used in part for public purposes.⁷² In a New York case it was held that there is no municipal liability for damage by reason of the bursting of a main pipe of the water supply system. The liability in such cases is clearly stated thus: "In all sewer or water main cases cited by the plaintiff in which the city was held liable there was either evidence of actual negligence in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by neglect on their part to repair promptly, or actual notice by reason of like prior occurrences that the sewer or pipe were defectively constructed or maintained. * * * A municipality is not an insurer of its water or sewer system any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system."⁷³

Light. "Cities undertaking to run the lighting business must assume the same responsibilities as private persons and private corporations running like plants. Public agents may not be as careful as those selected by private persons and responsible to private persons; but

⁷² Blake-McFall Co. v. Portland, 68 Or. 126, 135 Pac. 873.

Action for injury to property due to overflow of a standpipe, where it was said: "The standpipe even if used in a dual capacity formed part of the water system and the water on storage was the property of the defendant (municipality), subject to its sole management and control. It having voluntarily undertaken for its own corporate benefit a commercial enterprise, the defendant was required to use reasonable care in the maintenance and use of the

standpipe to avoid injury to the contiguous estate of plaintiff." Kelly v. Winthrop, 219 Mass. 471, 107 N. E. 414, per Braley, J.

Liable for leaky hydrant for damages due to water running into building. De Mayo v. Kansas City (Mo. 1919), 210 S. W. 380, following Stifel v. St. Louis (Mo.), 181 S. W. 577.

⁷³ Simon v. New York, 143 N. Y. S. 1097, 82 Misc. Rep. 454.

Statute exempting from liability in operation of waterworks. Stroup v. Kirksville (Mo. App. 1919), 215 S. W. 903.

this does not change the rule of law.”⁷⁴ Accordingly a municipality was held liable for the negligent construction and maintenance of a heavily charged electric wire, which on account of such negligence, came into contact with a guy wire attached to one of the poles of a telephone company, and charged the guy wire with a deadly current of electricity which was communicated to the body of deceased producing his death, while he was attempting to ascend the telephone pole in discharge of his duties as a lineman in the employ of the telephone company.⁷⁵ In another case a municipality was held liable for maintaining an electric wire so negligently that it fell on a pedestrian in the street and injured him, although the electric lighting plant was maintained by the city in its public municipal capacity, since the injury was due to the municipality’s omission of duty in keeping its public streets and sidewalks free from obstruction and the deadly wires of its light plant.⁷⁶

§ 2682. Same—liability where inadequate supply of water to extinguish fire.⁷⁷

There is no municipal liability for injuries growing out of negligence in failure to supply water for the extinguishment of fires.⁷⁸

⁷⁴ *Riley v. Independence*, 258 Mo. 671, 167 S. W. 1022, 1025, Ann. Cas. 1915D, 748.

“The city in furnishing electricity to its patrons was acting in its proprietary capacity, and was liable for damages caused by its negligence. * * * The duty of the city is to exercise the highest care to avoid injury to its customers.” *Hinze v. Iola*, 92 Kan. 779, 142 Pac. 947.

“In operating this electric plant, defendant (city) assumed the same responsibility to its employees injured therein as private persons and private corporations running similar plants.” *Durant v. Allen*

(Okl.), 168 Pac. 205, 107, approving *Riley v. Independence*, 258 Mo. 671, 167 S. W. 1122, Ann. Cas. 1915D, 748.

⁷⁵ *Saulman v. Nashville*, 131 Tenn. 427, 433, 175 S. W. 532, 534, L. R. A. 1915E, 316, quoting with approval part of § 2630, vol. 6, ante.

⁷⁶ *Goetzke v. Chicago*, 174 Ill. App. 446, 449, following *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345 (set out in § 2775, vol. 6, ante).

⁷⁷ No liability for inadequate supply of water. *Concordia Fire Ins. Co. v. Simmons Co.*, 167 Wis. 541, 168 N. W. 199.

⁷⁸ *Wallace v. Baltimore*, 123 Md.

§ 2683. Same—injuries in connection with hydrants.

For injury due to a hydrant placed in the street which made the use of the street dangerous which was not guarded by barriers or lights, a municipality was held liable to one injured who collided therewith.⁷⁹ And damage to property due to leakage of water from a defective waterplug which constitutes a part of its pipe distributing system, from which water could be taken for watering streets and for fire protection, may render the municipality liable therefor. Thus in such case where the city failed to exercise ordinary care, which if it had, the defect would have been discovered and it could have been remedied, it will be liable. The city was not acting in a governmental capacity in respect to the installation and maintenance of the water plug.⁸⁰

§ 2685. Ownership of railroads.

One killed by a policeman assigned to duty under a public commission of the city who was acting at the time as a special officer on a public belt railroad, it was held, created no municipal liability, since the operation of the road was regarded as a governmental function.⁸¹

§ 2687. Bathing beaches.

As the maintenance of free public baths is in its essence a public benefit, since it is manifestly in the interest of the public health that the people have abundant facilities for cleanliness, a bath house maintained under statute by a municipal corporation which gave way, and also its approaches, due to negligence in its maintenance, it was held, created no municipal liability, although a

638, 91 Atl. 687, quoting with approval the greater part of § 2682, vol. 6, ante.

⁷⁹ *Berger v. Solvay*, 141 N. Y. S. 995, 156 App. Div. 440.

⁸⁰ *Stifel v. St. Louis (Mo.)*, 181 S. W. 577, 579, 580.

Water from defective or leaky hydrant injuring property may create liability. *De Mayo v. Kansas City (Mo.)*, 210 S. W. 380.

⁸¹ *Jones v. New Orleans*, 143 La. 1073, 79 So. 865.

charge for the use of such baths might have been exacted.⁸²

§ 2687a. Children's playgrounds, camps and recreation centers.

There is no liability for injury to a boy while an inmate of a summer camp maintained by a municipality through its board of playground commissioners, although a small charge was made for caring for, boarding and lodging inmates.⁸³

VI. SEWERS, DRAINS, WATERCOURSES, AND SURFACE WATERS.

§ 2689. In general.⁸⁴

⁸² The petition contained no allegation that a charge was made. *Bolster v. Lawrence*, 225 Mass. 387, 114 N. E. 722, 724.

Maintenance of bath houses and bathing beach is a governmental function. *Nemet v. Kenosha* (Wis. 1919), 172 N. W. 711.

Public bath house maintained by a city. Where bather has money taken from his clothes hung in the bath house the city is not liable without proof of its negligence and absence of negligence on the part of the loser. *Walker v. Buffalo*, 175 N. Y. S. 274.

⁸³ "Children's playgrounds and recreation centers established and maintained by a city for the general use of the children of the city, where so conducted as to partake in no degree of the nature of a private business enterprise, do not differ substantially from a public park in so far as the question here involved is concerned. Like the public parks they are referable solely to the duty of maintaining the public health and have noth-

ing of the nature of an ordinary business enterprise." The court expressed the opinion that there was no substantial difference between a children's playground, established and maintained by the city within its limits, and a summer camp for the children of the city, maintained without its limits. *Kellar v. Los Angeles*, 179 Cal. 605, 178 Pac. 505.

⁸⁴ *Bieker v. Cullman*, 178 Ala. 662, 59 So. 625; *Herlihy v. New York*, 165 N. Y. S. 644.

Although a city has power to lay out a general sewer system, usually it is not liable for failure to do so. *Crystal Spring, etc., Co. v. Lomiri*, 165 Wis. 516, 162 N. W. 658.

Failure to act in the construction of sewers will not render the city liable. This is the general rule. But when it does undertake to act and is entered upon the work of building and maintaining sewers it will be held for the damages following the carelessness and unskillful manner performing the

§ 2690. Sewers as to which liability exists.⁸⁵

Municipal liability is restricted to the public sewers which the corporation controls; it does not extend to private sewers and drains which it did not construct, nor accept.⁸⁶

§ 2693. Liability for defective "plans."⁸⁷

same. *Kinlough v. Maplewood* (Mo. App.), 201 S. W. 625.

The mere failure of a city to grade or drain its streets does not render it liable to abutting owners for damage occasioned by surface water. The power to provide sewers and drains is one within the discretion of the city authorities; and where it has not undertaken to provide such drainage it is not liable for injuries resulting from the want thereof. *Messer v. Gulf C. & S. F. Ry. Co.* (Tex. Civ. App.), 153 S. W. 928.

Action for injury to pedestrian resulting from explosion of sewer gas in a sewer conduit which also contained an electric system, as he was in the act of stepping over the manhole in passing over the street. *Bolger v. Chicago*, 198 Ill. App. 123.

⁸⁵ *Gelford v. Hartford*, 85 Conn. 69, 84 Atl. 85; *Soucy v. Manchester*, 78 N. H. 591, 98 Atl. 518.

Sluice. In a particular case a sluice, catch basin and tile were held not to be sewers and were no part of the sewer system, but were maintained for the protection of the highway. *Sanborn v. Enosburg Falls*, 87 Vt. 479, 9 Atl. 746.

⁸⁶ Drains constructed by property owners, not being the act of the city, the city is not liable therefor. *Crystal Spring, etc., Co.*

v. Lormiri, 165 Wis. 516, 162 N. W. 658.

Where a city does not adopt a private sewer it is not liable for defects therein causing injury, etc. *Brooks v. Maysville*, 151 Ky. 707, 152 S. W. 788.

Unless a municipality adopts a sewer constructed by private parties as a municipal sewer no liability, as general rule, exists for injuries relating thereto. *Wanamaker v. Benzon*, 63 Pa. Super. Ct. 401.

Where a city never gave permission to treat and use a private sewer as a public sewer, it is not required to maintain it open and free of obstructions. *Van Trump v. Kansas City*, 187 Mo. App. 190, 173 S. W. 32.

⁸⁷ "A town is not liable in any form of proceedings for the consequences of some fault in the location, size, plan of construction, or general design of its sewers." *Sherburne v. Sanford*, 113 Me. 66, 92 Atl. 997, 1000; *Keeley v. Portland*, 100 Me. 260, 61 Atl. 181.

If the injury results from a danger inherent in the plan adopted the municipality is not liable, but if the danger arises from negligent construction or maintenance of the place, it is liable. *Trippensee v. Jefferson City*, 174 Mo. App. 727, 729, 161 S. W. 303, re-

§ 2694. Same—liability for inadequate sewers or drains.⁸⁸

§ 2695. Liability for negligence in construction or failure to repair.

While a municipality is not bound to construct sewers in its highways, nor is it liable ordinarily in case a sewer which it does construct proves inadequate, it assumes the duty of keeping in good condition and repair such sewers as it does install, and a failure to perform that duty will render it liable for damages in case of injury.⁸⁹

It is quite uniformly held that a municipality in constructing and maintaining sewers acts in its corporate and ministerial capacity, and is therefore liable for negligence resulting in injury resulting thereto,⁹⁰ but the con-

sulting from negligent construction.

⁸⁸ *Dohrmann v. Hudson County Board*, 84 N. J. L. 689, 87 Atl. 463, following *Kehoe v. Rutherford*, 74 N. J. L. 659, 65 Atl. 1046, 122 Am. St. Rep. 411; *Malpass v. Philadelphia*, 52 Pa. Super. Ct. 250.

⁸⁹ *Malpass v. Philadelphia*, 52 Pa. Super. Ct. 250.

Where the municipality has provided sewers and gutters for the drainage of surface water it is thereby bound to use reasonable diligence to discover and remedy any defects therein. *Lobravico v. New York*, 140 N. Y. S. 161, 155 App. Div. 184.

A municipality having constructed and put in operation a system of sewers is required to keep the same in a reasonable safe and effective condition and use ordinary care and diligence to keep the same free of obstructions likely to cause damage. *Hawkins v. Springfield*, 194 Mo. App. 151, 154,

155, 186 S. W. 576, citing § 2695, vol. 6, ante.

"After a sewer or drain has been constructed by a municipal corporation when it assumes the control and management thereof it is bound to use reasonable diligence and care to keep the same in good repair, and is liable in damages for injuries resulting from its negligence in this respect." *Atlanta v. Trussell*, 21 Ga. App. 340, 94 S. E. 649, 652.

⁹⁰ *Atlanta v. Trussell*, 21 Ga. App. 340, 94 S. E. 649, 651.

"The duty of a municipal corporation to maintain its sewers in a reasonably safe condition is ministerial, is that of ordinary care, and a negligent breach thereof which causes or directly contributes to an injury is actionable." *Hannan v. Kansas City*, 187 Mo. 315, 173 S. W. 703, 705.

"The construction and maintenance of sewers is not considered a governmental function but a

trary has also been held.⁹¹ However, liability is generally sustained in nearly all the states.

As to the measure of duty it is well settled that a municipal corporation is not an insurer of the condition of its sewers; and that, to charge it with damages occasioned by an obstruction therein, negligence must be proven.⁹²

§ 2696. Same—notice of defects or obstructions.

After notice of an obstruction in a sewer which floods property the municipality is chargeable with negligence

power conferred upon a municipal corporation for its own benefit and that of its citizens, although its exercise may conduce to the general good. (*Winn v. Rutland*, 52 Vt. 481.) The sewers are the sewers of the corporation; but all highways are public highways, and their maintenance and protection are governmental functions." *Sanborn v. Enosburg Falls*, 87 Vt. 479, 89 Atl. 746.

Culvert. Liability for injury due for failure to repair culvert on highway, where duty was imposed by statute. *Hickey v. Berlin*, 78 N. H. 69, 96 Atl. 295.

⁹¹ It seems in Kentucky it is held that a municipality in the construction and maintenance of its sewers acts in a governmental capacity in protecting the public health. "The purpose of sewerage is to protect the health of the city and all the work of maintenance of a sewer system is the exercise of a governmental function by the city, for which under our repeated rulings * * * neither the city nor the commissioners of sewerage are liable." *Johnson's Admr. v. Louisville Comrs. of Sewerage*, 160 Ky. 356, 169 S. W. 827; *Louisville v.*

Frank's Guardian, 154 Ky. 254, 157 S. W. 24; *Smith's Admr. v. Louisville Comrs. of Sewerage*, 146 Ky. 563, 143 S. W. 3, 38 L. R. A. (N. S.) 151.

A culvert constructed by the municipality in connection with a sewer to drain off accumulating service water which collected in a depression or pond, does not render the city liable for the death of a child drowning due to falling into the pond and thence into the culvert, because the construction was "in the performance of a public governmental duty imposed upon the city for public benefit, from which no pecuniary benefit was derived," and for which, in view of the uniform rule in Kentucky "the city is not answerable in damages, even though negligently done, except under certain conditions not present here, as where the negligence rendered a public street not reasonably safe for such uses as should be anticipated or where the damage amounts to a taking of private property for public use." *Von Almen's Adm'r v. Louisville*, 180 Ky. 441, 202 S. W. 80, 82; *Louisville v. Frank's Adm'r*, 154 Ky. 254, 157 S. W. 24.

⁹² *Vitucci Importing Co. v.*

in the maintenance of the sewer unless it acts with reasonable promptness in removing the obstruction.⁹³ As to notice to the municipality of defects or obstructions in sewers, as a condition precedent to establish liability resulting in injury, it should be observed that the judicial utterances are not harmonious. As the taking, and frequently the damaging, of private property without due process of law, etc., is forbidden by constitution, provisions as to notice have been held applicable in sewer cases,⁹⁴ and the opinion has been expressed that these cases should be measured by a different rule from that applied to defects or obstructions in public ways.⁹⁵

Seattle, 72 Wash. 192, 130 Pac. 109.

⁹³ *Sotel v. New York*, 142 N. Y. S. 361, 81 Misc. Rep. 344.

Suit to recover damages for flooding of a basement due to an obstruction in a sewer was denied where there was no allegation of defective or improper construction or of failure on the part of the city to remove the construction when brought to its notice. *Norwood v. Gobrecht-Gyer Co.*, 2 Ohio App. 18, 35 Ohio Cir. Ct. R. 456.

⁹⁴ Where the sewer was negligently constructed by the city, and as a proximate result of that negligence, the sewer burst causing the damage complained of, a requirement of the charter that as a condition to make the city liable, notice shall be given of defects (defect in any public work), twenty-four hours prior to the occurrence of the injury or that the authorities have actual knowledge, etc., was held inapplicable, as the constitution forbids damaging or taking property without compensation. *Shows v. Dallas* (Tex Civ.

App.), 172 S. W. 1137, relying on *Houston v. Isaacks*, 68 Tex. 116, 3 S. W. 693.

⁹⁵ "Numerically speaking, the weight of authority appears to be to the effect that notice, either actual or constructive, is an essential element upon which to predicate liability. The opposite view, however, is supported by very respectable authority, and seems to be sound in reason. The sewers are constructed and maintained by the city and are under its exclusive control. It is the city's duty to exercise ordinary care in causing an inspection of them from time to time, in order that needed repairs may be made therein and obstructions removed therefrom. The individual whose property may be subjected to destruction by a defective sewer has neither the duty nor the right of inspection; neither does he have the authority to repair. The first knowledge that he had or can have that an obstruction exists in the sewer is when his property suffers damage which is caused thereby. There appears no good reason why the

§ 2697. Nuisances.

If a sewer, a sewage disposal plant, or a septic tank, maintained by a municipality becomes a nuisance, and injury to person or property results therefrom, liability exists therefor.⁹⁶

§ 2698. Same—liability for death or sickness.⁹⁷

city should be entitled to notice, either actual or constructive, of a defect or obstruction in one of its sewers as a necessary element of liability, when such defect or obstruction is such that it would have been discovered by reasonable inspection. Manifestly the liability of a municipal corporation for defects or obstructions in its sewers should be measured by a different rule from that which applies to defects or obstructions on its streets or sidewalk. (*McCarthy v. Syracuse*, 46 N. Y. 194; *Vanderslice v. Philadelphia*, 103 Pa. 102). *Vitucci Importing Co. v. Seattle*, 72 Wash. 192, 130 Pac. 109, per Main, J.

⁹⁶ Failure to abate an alleged nuisance resulting from bad condition of sewer, held to create no municipal liability. *Bieker v. Cullman*, 178 Ala. 662, 59 So. 625.

Installing and maintaining a sewer near plaintiff's residence alleged to be a nuisance. When a nuisance in fact exists the issue of negligence is not involved. *Clarendon v. Betts* (Tex. Civ. App.), 174 S. W. 958.

Defect in drain of town wherein paper collected and one was injured by reason of his crutch passing through an opening in the drain cover which was concealed

by paper and circulars and refuse which had collected. Held, no municipal liability. *Delamaine v. Revere*, 229 Mass. 403, 118 N. E. 660.

Sewage disposal plant which is a public nuisance, although constructed and maintained by statutory authority by a municipality creates municipal liability, irrespective of negligence, etc. *Taylor v. Baltimore*, 130 Md. 133, 99 Atl. 900, 905, L. R. A. 1917C, 1046, citing § 2697, vol. 6, ante.

Septic tank. Action to enjoin construction and maintenance by the city of a septic concentration tank to be used in connection with its sewer system, because it was alleged that the effluent from the tank would be discharged into a creek which was a public water-course, would pollute the water of the creek, and noxious and unwholesome odors and gases would arise, that the tank was very near complainant's residence, it would be a nuisance and thereby deprive complainant of the comfortable enjoyment of his home was sustained. *Cardwell v. Austin* (Tex. Civ. App.), 168 S. W. 385.

⁹⁷ *Cook v. Mohawk*, 207 N. Y. 311, 100 N. E. 815. Municipal liability for nuisance causing injury to property and health, due

§ 2699. Discharge of sewage on private property.⁹⁸

A municipality is answerable in damages if it discharges the outflow of a sewer, or a system of sewerage upon the property of another, and this upon the ground that such discharge constitutes a private nuisance for which action may be maintained by the person injured.⁹⁹ Thus flooding a basement of private property by the back-

to negligent maintenance of sewer system. *Princeton v. Pool*, 171 Ky. 638, 188 S. W. 758.

No liability to property owner due to street depression filled by stagnant water producing illness. *Triplett v. Columbia* (S. C. 1918), 96 S. E. 675.

Action for death of nine year old boy alleged due to disease contracted from stagnant pool of water the municipality permitted to collect and remain in the street in front of the residence where the boy lived. Liability under facts, denied. *Bruggeman v. York City*, 254 Pa. 430, 98 Atl. 970.

⁹⁸ *Paris v. Baldwin Bros.*, 169 Ky. 802, 185 S. W. 144; *Taylor v. Baltimore*, 130 Md. 133, 99 Atl. 900, 905, L. R. A. 1917C, 1046 (quoting with approval greater part of § 2699, vol. 6, ante); *Kinlough v. Maplewood* (Mo. App.), 201 S. W. 625; *Geiger v. St. Joseph* (Mo. App.), 198 S. W. 78; *Sotel v. New York*, 142 N. Y. S. 361, 81 Misc. Rep. 344.

Contributory negligence. If a sewer main is insufficient with the result that water runs into a private basement, the owner thereof with full knowledge who fails to take the necessary precaution to guard his premises may be held for contributory negligence as a matter of law so as to bar recov-

ery. *Hume v. Chilton*, 167 Wis. 78, 166 N. W. 776.

No municipal liability where damage is due to negligence of plaintiff, as where flooding resulted from a defective backwater valve under his control. *Woolworth Co. v. Seattle*, 104 Wash. 629, 177 Pac. 664.

⁹⁹ Action for damages to real property, evidenced and measured by loss of rents resulting from repeated flooding of such premises by the overflow from a sewer alleged to have been improperly and negligently constructed by the city. Action is for negligence or for the maintenance of a nuisance, and not one of trespass. *Meruk v. New York*, 223 N. Y. 271, 119 N. E. 571, affirming 163 N. Y. S. 1123.

"A municipality is not responsible for any defect or want of efficiency in a general plan for drainage adopted by a board of public officers, even though private individuals may be exposed to great inconvenience and loss. (*Child v. Boston*, 4 Allen 41, 81 Amer. Dec. 680; *Buckley v. New Bedford*, 151 Mass. 64, 29 N. E. 201; *Manning v. Springfield*, 184 Mass. 245, 6 N. E. 202; *Robinson v. Everett*, 191 Mass. 587, 77 N. E. 1151.) It is answerable in damages, however, if it discharges

water of a sewer due to negligent sewer connection—as connecting a surface drain with a small sewer instead of a storm sewer constructed by the city—renders the municipality liable, notwithstanding there was an unusual rainfall. If on the other hand, as stated by the court, proper connection had been made with the storm sewer, and the damage would result alone from the unusual rainfall, there would be no municipal liability, without a showing that the sewer system was inadequate. Moreover, if the damage was proximately due to the unusual rainfall, but was aided by the negligent connection, municipal liability would exist to the extent of the damages contributed by the negligent connection.¹ A municipality is liable also to an action at law by the construction of a system of drainage of such a character that water is

the outflow of a system of sewerage upon the property of another. This is upon the ground that such discharge constitutes a private nuisance, for which action may be maintained by the persons injured. This principle finds illustrations in the construction of drains for the disposal of house sewage. (*Haskell v. New Bedford*, 108 Mass. 208; *Baryton v. Fall River*, 113 Mass. 20, 18 Amer. Rep. 470) and also in those which disposes of surface water (*Manning v. Lowell*, 130 Mass. 21; *Daley v. Watertown*, 192 Mass. 116, 71 N. E. 143). In reason it applies with equal force to underground waters collected and carried in a drain exclusively devoted to that purpose. The damage is the same in its substantial effects from whatever source the water may be collected. It is as distinctly a damage to property unreasonably to increase the water naturally flowing in the brook so as to overflow its banks as it is to diminish or pollute such

water. (See *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 86, 103 N. E. 87, 49 L. R. A. (N. S.) 59. * * * A city or town becomes liable to an action at law by the construction of a system of drainage of such a character that water is collected into an artificial channel and from its outlet accumulated upon the land of a private owner in such quantities as to create a private nuisance. This has been explained at length in previous decisions with affluent citation of authorities. It is unnecessary to go over the ground again. (*Bates v. West Borough*, 151 Mass. 174, 182, 23 N. E. 1070, 70 L. R. A. 156; *Nevins v. Fitchburg*, 174 Mass. 545, 55 N. E. 321, 47 L. R. A. 312; *Whitten v. Haverhill*, 204 Mass. 95, 104, 90 N. E. 409.) The plaintiff's case falls within this class." *Diamond v. Attleborough*, 219 Mass. 587, 107 N. E. 445, per Rugg, C. J.

¹ *Haley & Lang Co. v. Huron*, 36 S. D. 6, 153 N. W. 891.

collected into an artificial channel and from its outlet accumulated upon the land of a private owner in such quantities as to create a private nuisance.²

The right to flow sewage on another's land can not be acquired by prescription by having done so for more than the statutory period (ten years) where this was not done under a claim of right and was not adverse in its character. To establish a prescriptive right to maintain a nuisance it must appear that the user had continued in substantially the same manner with equally injurious results for the entire statutory period.³

§ 2700. Same—surface water.⁴

As tersely stated in a late New Jersey case: "The rule of law is that a municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take, and cast it, in a body large enough to do substantial injury, on land and premises where, but for such artificial drains, it would not go."⁵ There is

² *Diamond v. Attleborough*, 219 Mass. 587, 107 N. E. 445, per Rugg, C. J.

³ *Fansler v. Sedalia*, 189 Mo. App. 454, 459, 176 S. W. 1102.

See § 1441, vol. A, ante; § 2706, vol. 6, ante.

⁴ *Georgia. Atlanta v. Holcomb*, 20 Ga. App. 601, 93 S. E. 259; *Milledgeville v. Sternbridge*, 139 Ga. 692, 78 S. E. 35.

Minnesota. Weber v. Minneapolis, 132 Minn. 170, 156 N. W. 287.

Missouri. Frederick v. Joplin (Mo. App.), 201 S. W. 1147; *Kinlough v. Maplewood* (Mo. App.), 201 S. W. 625.

New Jersey. Bloom v. Orange, 91 N. J. L. 376, 103 Atl. 395.

West Virginia. Lutz v. Charleston, 76 W. Va. 657, 86 S. E. 561.

Wisconsin. Knapp v. Deer

Creek, 162 Wis. 168, 155 N. W. 940.

Overflow of surface water causing damage to landowner due to a town's negligence in maintaining defective catch-basins, held under a particular statute to create no liability. *Dyer v. South Portland*, 111 Me. 119, 88 Atl. 398.

⁵ *Dohrmann v. Hudson County Board, etc.*, 84 N. J. L. 689, 87 Atl. 463, approving *Kehoe v. Rutherford*, 74 N. J. L. 659, 65 Atl. 1046, 122 Am. St. Rep. 411, which case pointed out that the exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties, whereby a public wrong is done for which an indictment will lie, does not extend to actions where

no municipal liability from the collection and discharge of surface water on private premises unless the construction of the drain from which the damage resulted was duly authorized by the municipality.⁶

§ 2701. Watercourses, liability in regard to.⁷

injury is the result of active wrong doing chargeable to the corporation.

Jerolomon v. Belleville, 90 N. J. L. 206, 101 Atl. 244, declares the law in the precise language of the *Dohrmann v. Hudson County Board*, etc., *supra*.

One may not in diverting water from its usual course collect and convey it by embankments, ditches or artificial channels to another's premises and permit it to overflow such premises, where prior to that time such premises were not so flooded. *Armour v. Orr*, 35 Okl. 305, 129 Pac. 867.

"It is a well settled principle of law that neither the owner of land nor a municipal corporation has any right to collect together waters and discharge them upon the lands of another in a greater quantity than what would have reached the property by natural drainage." Thus where the effect of a sewer constructed by the municipality, "whatever its plan is to cause a direct invasion of private property by collecting and throwing upon it, in new channels or in increased quantities, water that would not otherwise have found its way there, the corporation is liable." "We cannot conceive why the same rule should not be applied to surface drainage or surface sewers." *Naysmith v. Auburn*, 95 Neb. 582, 146 N. W.

971, 973, quoting from with approval 10 Am. & Enk. Ency. Law (2nd ed). 243.

⁶*Jones v. Caruthersville*, 186 Mo. App. 404, 171 S. W. 639.

⁷Liability for changing into a new channel the waters of a brook interfering with rights of riparian owners. *Stevens v. Worcester*, 219 Mass. 128, 106 N. E. 587.

Action for negligence of a municipality in "its fixing of a channel for Cherry creek (a natural watercourse) within the city," and failure to exercise ordinary care and prudence "in adopting a plan to regulate the size, character, and carrying capacity of said channel." *Denver v. Merchant's Biscuit Co.*, 61 Colo. 238, 157 Pac. 842.

Action for alleged polluting of natural watercourse by private sewers draining therein. "In the absence of evidence from which it may be inferred that the defendant (city) in some way adopted the waterway in question as a part of its sewer system, or as an outlet therefor, or by some affirmative act or permission, gave consent to residents residing in the vicinity thereof to construct and connect private drainage therewith, or has in some way contributed to the alleged nuisance complained of, it has violated no duty owing by it to plaintiff and could not be liable for

§ 2702. Same—public improvements obstructing water-course.⁸

Obstruction of a natural watercourse by a municipality resulting in injury creates liability.⁹ For example, extending a street across a natural water course resulting in damage to property by flooding it creates liability.¹⁰

§ 2704. Same—rights of riparian owners.¹¹

damages resulting from the alleged wrongful acts of residents upon the street or along the course of said waterway.” *Wilson v. Ottumwa*, 181 Ia. 303, 164 N. W. 613, 615.

⁸ *Boise Development Co. v. Boise City*, 30 Idaho 675, 167 Pac. 1032, 1035 (citing § 2702, vol. 6, ante.); *Diamond v. Attleborough*, 219 Mass. 587, 107 N. E. 445.

The municipality was acting in the accomplishment of a public purpose and within the powers granted it, without negligence, in making improvements, to protect a bridge which diverted the waters of a river into an old channel. *Chase-Hibbard Milling Co. v. Elmira*, 207 N. Y. 460, 101 N. E. 158, affirming 127 N. Y. S. 1115, 143 App. Div. 971.

⁹ *Roberts v. Glens Falls*, 151 N. Y. S. 1010, 166 App. Div. 464.

There is municipal liability for obstructing a natural waterway in such manner as to discharge its waters upon private land, causing damage thereto and affecting the health of the members of the occupant's family. *Cook v. Mohawk*, 207 N. Y. 311, 100 N. E. 815.

“A municipality charged with the public duty of maintaining streets has no implied authority to dam up or otherwise obstruct

natural watercourses. The policy of the government is to conduct its highways over such natural watercourses by bridges or culverts and in the absence of valid legislative power, the obstruction of a natural watercourse by a municipal corporation to the injury of adjoining landowners is something for the consequences of which the municipality is liable, as was decided in *Haynes v. Burlington*, 38 Vt. 350. It is as much the duty of a town to maintain a passage for a natural stream as it is to build highways and bridges, and if a town undertakes to carry a highway across a natural stream by damming up the stream it is not acting in the discharge of a public duty. Towns and villages cannot dam up streams to the injuries of riparian owners by virtue of their duty to keep highways in repair any more than they can tear down houses. If property has to be so taken it must be under the right of eminent domain.” *Sanborn v. Enosburg Falls*, 87 Vt. 479, 89 Atl. 746.

¹⁰ *Powelson v. Seattle*, 87 Wash. 617, 152 Pac. 329.

¹¹ *Boise Development Co. v. Boise City*, 30 Idaho 675, 167 Pac. 1032, 1035, citing § 2704, vol. 6, ante.

§ 2706. Same—discharge of sewage into: polluting streams.

Whether the discharge of sewage into streams will create municipal liability when such act results in private injury is dependent to a great extent on the particular circumstances.¹² Grant of power to construct sewers is not implied authority to pollute a stream with sewage.¹³ As clearly stated in a New York case: "The inhabitants of a city or village, collectively, have no more right to pollute the water of a stream than a single individual, and where a city empties its sewer system into a living stream and damage results to the riparian owners, it must respond to damages."¹⁴ The general rule, therefore, is that sewage cannot be cast into a stream to such an extent as to pollute it. A late Michigan case declares

¹² Kentucky. *Kraver v. Smith*, 164 Ky. 674, 177 S. W. 286; *Henderson v. Robinson*, 152 Ky. 245, 153 S. W. 224.

Missouri. *Smith v. Sedalia*, 244 Mo. 107, 124, 149 S. W. 597.

Maryland. *Taylor v. Baltimore*, 130 Md. 133, 99 Atl. 900, 905, L. R. A. 1917C, 1046 (quoting with approval from § 2706, vol. 6, ante).

New Jersey. *Garrison v. Ft. Lee Borough*, 92 N. J. L. 566, 106 Atl. 381.

N. Carolina. *Quickel v. Gastonia*, 171 N. C. 404, 88 S. E. 754; *Moser v. Burlington*, 162 N. C. 141, 78 S. E. 74.

S. Carolina. *Parish v. Yorkville*, 106 S. C. 23, 90 S. E. 185; *Sturgis v. Rock Hill* (S. C. 1919), 100 S. E. 163.

Action lies in North Carolina irrespective of the fact that the acts complained of were done in the exercise of governmental functions. *Rhodes v. Durham*, 165 N. C. 679, 81 S. E. 938.

Municipal liability exists for the discharging of offensive matter by a municipality from its filter plant into a navigable river. *Western New York Water Co. v. Niagara Falls*, 154 N. Y. S. 1046, 91 Misc. Rep. 73.

Injunction to enjoin discharge of effluent from a septic tank into a small creek alleged to injure plaintiffs land. Evidence considered. *Johns v. Platteville*, 163 Wis. 219, 157 N. W. 761.

¹³ "Such would not be a governmental use or a duty imposed, but only a privilege to construct sewers." "The distinction in such cases must be noted between the right of a city, even with legislative authority, to pollute a stream in case the title to the bed and banks is in a riparian owner, and where the state is the owner of the stream." *Smith v. Silverton*, 61 Or. 379, 142 Pac. 609.

¹⁴ *Luther v. Batavia*, 154 N. Y. S. 784, 169 App. Div. 71.

that a municipality cannot, without direct legislative authority, pollute a stream with its sewage to the injury of lower proprietors; and it cannot be done by legislative authority without making compensation to the injured riparian owner.¹⁵ The right of the riparian owner to use the water as it passes for all domestic and industrial purposes, provided that he does not impair the like rights of proprietors below, is recognized as in the nature of a property right, and not even the legislature can authorize its violation, consequently, it is generally held that municipalities have no right to collect and empty sewage into a stream to the prejudice of the proper use of the water by riparian owners below even if authorized by the legislature so to do. However, this rule does not apply to tidal waters in streams tributary thereto.¹⁶

¹⁵ Attorney-General v. Grand Rapids, 175 Mich. 503, 141 N. W. 890, 902.

¹⁶ Seaman v. New York, 161 N. Y. S. 1002, 176 App. Div. 608.

The recognized rule is that a municipality has no right to cast its sewage into a stream so as to pollute it to the injury of the lower riparian proprietors. An exception to this rule exists dependent on circumstances. It is regarded as elementary that a municipality's right in this respect is dependent upon legislative authority unless it has first condemned the interest injuriously effected, "but it seems that by legislative authority it may with impunity sewer into navigable or tidal streams, if done in a proper manner, though it is doubtful if the legislature can authorize it so to use a stream, the bed and banks of which are in private ownership" "The rule is stated to be that, in this country, even if the legislative authority is conceded,

still the question arises as to whether or not injuries are inflicted which amount to a public nuisance or a taking of private property in the constitutional sense; and, if so, the municipality is not protected or justified in such appropriation unless it has acquired the right by condemnation and the payment of compensation." *Smith v. Silverton*, 61 Or. 379, 142 Pac. 609.

Surface drainage was collected by a system of sewers and discharged through a culvert into the bed of a small natural watercourse at a point just above land of complainant, and caused his land to be covered with offensive deposits. Liability declared. *Feudl v. New Britain*, 88 Conn. 125, 90 Atl. 35.

Municipal liability exists for discharging sewage into a creek and polluting the waters thereof and causing it to become foul with noxious and poisonous substances which are offensive to the smell and a menace to the health of

Where a municipality wrongfully pollutes a stream with sewage the fact that the conditions in the stream were in part brought about by the emptying of slops from a distillery into the waters causing a greater pollution of the stream will not excuse municipal liability.¹⁷ The right to empty into streams is often claimed by prescription.¹⁸ In a Michigan case involving an injunction pro-

persons living or working in that vicinity. *Ardmore v. Colvert* (Okl.), 152 Pac. 603, relying on *Colvert v. Ardmore*, 31 Okl. 537, 122 Pac. 508.

Liability exists for turning sewage into a stream. It is taking property within the meaning of the constitution without compensation. *Jones v. Sewer Improvement Dist.*, 119 Ark. 166, 177 S. W. 888.

The turning of sewage by a municipal corporation into a stream to the injury of a lower riparian owner of property is within the constitutional provision requiring compensation for damaging property for a public use. *El Dorado v. Scruggs*, 113 Ark. 239, 168 S. W. 46; *McLaughlin v. Hope*, 107 Ark. 442, 155 S. W. 910, 46 L. R. A. (N. S.) 137.

"The decisions of this state are in approval of the principle that the owner can recover such damages for a wrong of this character, and that the right is not affected by the fact that the acts complained of were done in the exercise of governmental functions, or by express municipal or legislative authority; the position being that the damage arising from the impaired value of the property is to be considered and dealt with to that extent as a taking or appropriation, and brings the claim with-

in the constitutional principle that a man's property may not be taken from him, even for the public benefit, except upon compensation duly made." *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 377. The case mentions that the courts of Indiana and probably cases in one or two of the other states seems to have adopted the contrary view. *Valpairaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305.

¹⁷ *Henderson v. Robinson*, 152 Ky. 245, 153 S. W. 224.

¹⁸ Plea of prescriptive right, held insufficient. *Kellogg v. Kirksville*, 149 Mo. App. 1, 129 S. W. 57. Facts appear in *Kellogg v. Kirksville*, 132 Mo. App. 519, 112 S. W. 296.

Question of prescriptive right of city to empty sewage discussed in *Fansler v. Sedalia*, 189 Mo. App. 454, 176 S. W. 1102.

Right to empty sewage into stream claimed as prescriptive right, denied. *Kraver v. Smith*, 164 Ky. 674, 177 S. W. 286, 292.

Long continued use of a stream in which to empty sewage by a city does not create a prescriptive right on the part of the city so to discharge its sewage. *Henderson v. Herron*, 152 Ky. 341, 153 S. W. 440; *Henderson v. Robinson*, 152 Ky. 245, 153 S. W. 224.

ceeding growing out of discharging sewage into a river, and polluting the waters thereof where it was claimed that it constituted a public nuisance, in granting the injunction, the court said: "There can be no prescriptive right to pollute a stream by the discharge of sewage in such manner and to such an extent as to be injurious to public health. Even assuming a prescriptive right to foul a stream with sewage can be acquired, such must be restricted to the limits of it when the period of prescription commenced; and if the pollution is substantially increased whether gradually or suddenly, the court will interfere by injunction to prevent the wrongful excess, and if it is impossible to separate the illegal excess from the legal user, the wrongdoer must bear the consequences of any restrictions necessary to prevent the excess, even if it unavoidably extends to the total prohibition of the user."¹⁹

§ 2707. Surface water.²⁰

§ 2708. Same—liability for injuries from public improvements.²¹

If in the surfacing of a street the cement is so unevenly and negligently laid as to permit the water to collect and

¹⁹ Attorney-General v. Grand Rapids, 175 Mich. 503, 141 N. W. 890, 901, 902.

²⁰ Gibson v. St. Joseph (Mo. App. 1919), 216 S. W. 50.

Liability for casting on private land. Tucson v. Dunseath, 15 Ariz. 355, 139 Pac. 177.

Discharge of water on land from storm sewer, as natural outlet creates no liability. Lessinger v. Harlan (Ia. 1918), 168 N. W. 803.

In the construction of a street a municipality is liable for diverting surface water upon private premises. Leynaud v. Cherry, 203 Ill. App. 541, 544.

In improving streets a city has not the unlimited right to divert water therefrom and discharge it by artificial means in such quantities as to do damage to private property. Dick v. Los Angeles, 34 Cal. App. 724, 168 Pac. 703.

"Rainfalls are divided into three classes, ordinary, extraordinary and unprecedented. The city is not liable for damages resulting from an extraordinary rainfall." Andrus v. Ashland (Wis. 1919), 172 N. W. 721; Gender v. Milwaukee, 147 Wis. 491, 133 N. W. 835.

²¹ Farrell v. Ontario (Cal. App.),

remain in the street in front of private property, instead of running off in gutters municipal liability is established, since this is negligent construction.²²

§ 2710. Same—liability in case of negligence.²³

§ 2711. Same—collecting surface water and casting it in body on private land.

Late decisions appear to adhere to the well established

178 Pac. 740; *Dance v. Rome* (Ga. App.), 99 S. E. 51; *Kirkland Distributing Co. v. Seaboard Air Line Ry.* (S. C.), 98 S. E. 843; *Andrus v. Ashland* (Wis. 1919), 172 N. W. 721.

Flooding basement due to grading street. *Kirkland Distributing Co., v. Seaboard Air Line Ry.* (S. C. 1919), 98 S. E. 843.

Provisions should be made to carry off water from such rains as might be reasonably expected. *Shaw v. Greensboro* (N. C. 1920), 101 S. E. 27.

No municipal liability arises for the construction of a drain pipe which broke and flooded private premises. *Warden v. South Pasadena*, 168 Cal. 612, 143 Pac. 776.

Municipal liability arises where the improvement of a street caused the water to overflow private property during heavy rains. *Beard v. Kansas City*, 96 Kan. 102, 150 Pac. 540.

The city is required under the law to provide for carrying off water due to ordinary and usual rains and is not required to anticipate and guard against the effects and consequences of unusual and extraordinary rains. *Lexington v. Henderson*, 180 Ky. 650, 203 S. W. 528.

In Washington a municipal corporation is not liable for injuries consequent upon the initial grading and improvement of its streets. As to surface water the rule of the common law prevails in that state. Therefore, in that state a municipality is not liable in damages for injuries to private property by the collection of surface water thereon caused by the initial grading or improvement of its streets and alleys. *Thorpe v. Spokane*, 78 Wash. 488, 139 Pac. 221, following *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859.

²² The evidence "tends to establish the fact, not that there was an insufficient grade to the street in order to drain it, but that there was a negligent laying of the cement to that grade so as to make the surface of the cement not conform to the grade throughout the block. This would be negligent construction and injuries caused therefrom entitled plaintiff to damages." *White v. Springfield*, 189 Mo. App. 228, 232, 233, 173 S. W. 1091, citing § 2708. pp. 5571, 5572, vol. 6, ante.

²³ *Yowmans v. Hendersonville*, 175 N. C. 574, 578, 96 S. E. 45, 47, citing § 2710, vol. 6, ante.

Cement surfacing of street laid

general rule that, while municipal authorities may pave and grade streets and are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done, they are not permitted to concentrate and gather such waters into artificial drains or channels and throw them on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow, unless compensation is made, and for breach of duty in this respect an action will lie.²⁴ Thus diverting the natural flow of water by an outlet ditch from street drains may create municipal liability in event of injury.²⁵ So a city in building an engine house may be liable where it raised the grade of its lot, diverted the waters therefrom and dammed the natural course of flow and cast it upon private property.²⁶ In an action for damages caused by surface water, due to the construction of a drain, where it was alleged that the municipality gathered it into artificial water channels and discharged it upon private land, the trial court found that the discharge of surface water on the land involved was not greater than it was prior to the construction of the drain, that the municipality had not authorized anyone to drain sewage from his premises into the street drain, and that if such use had been made of the drain it was without the municipality's knowledge or consent. It was held that the municipality had the right to improve its streets and to change the natural course of the surface water by such improvements within the limits of the highways, even though such improvements changed the flow of such surface water onto adjoining land.²⁷

so unevenly as to cause the surface water to collect and remain in the street, held negligent construction. *White v. Springfield*, 189 Mo. App. 228, 232, 233, 173 S. W. 1091, citing § 2708, vol. 6, ante.

²⁴ *Yowmans v. Hendersonville*, 175 N. C. 574, 578, 96 S. E. 45, 47, citing § 2711, vol. 6, ante.

Oklahoma City v. Stewart (Okl. 1919), 184 Pac. 779.

²⁵ *Watkins v. Port Gibson*, 113 Miss. 38, 73 So. 867.

²⁶ *Bruggeman v. York City*, 63 Pa. Super. Ct. 542.

²⁷ *Stoecker v. Cedarburg*, 161 Wis. 34, 152 N. W. 445.

VII. NOTICE OF THE "ACCIDENT."

§ 2714. Statutory and charter provisions.²⁸

The applicability of the requirement depends, of course, upon the proper construction of governing provision, whether statutory or charter,²⁹ but when applicable

²⁸ *Bostwick v. Griffin*, 141 Ga. 120, 80 S. E. 657; *Hampton v. Duluth*, 140 Minn. 303, 168 N. W. 20; *Morrill v. Kansas City* (Mo. App.), 179 S. W. 759; *Hartsell v. Ashville*, 164 N. C. 193, 80 S. E. 226; *Nashville v. Black* (Tenn. 1920), 219 S. W. 1043, quoting with approval § 2714, vol. 6, ante.

Dallas v. Shows (Tex. Com. App.), 212 S. W. 633, 634, quoting with approval part of § 2715, vol. 6, ante.

Requirement held valid. *Grambs v. Birmingham* (Ala. 1919), 80 So. 874.

Requirement, held applicable though the injury was the result of act of city. *Dallas v. Shows* (Tex. Com. App. 1919), 212 S. W. 633.

²⁹ Applicable only to personal injuries, not to injuries to property. Strict construction adopted. *San Antonio v. Pfeiffer* (Tex. Civ. App. 1919), 216 S. W. 207.

Requirement as to notice, held not applicable to suits for damages arising from a nuisance. *DeMoll v. New York*, 143 N. Y. S. 966, 163 App. Div. 676.

Law held applicable to action or damages by parent for loss of services of son due to injuries from defective sidewalk. *Palmer v. Cedar Rapids*, 165 Ia. 595, 146 N. W. 827.

Particular requirement, held applicable to personal injuries only,

and not to action by father for the loss of services of his son and for expenses incurred in curing the son of personal injuries sustained by him on account of a defective sidewalk. *Calabrese v. Chicago Heights*, 189 Ill. App. 534.

Statute held applicable to action for injury to private property due to the negligence of the city. By reason of the provision of the statutes certain Minnesota decisions have been abrogated. *Diamond Iron Works v. Minneapolis*, 129 Minn. 267, 152 N. W. 647.

Act relates only to injuries inflicted on persons or property on a street due to defects therein, incapacitating it partially or wholly from services. Does not relate to injury in flooding property due to an insufficient drain. *McCarthy v. Mountain View*, 136 Tenn. 133, 188 S. W. 595, approving *Pye v. Mankato*, 38 Minn. 536, 38 N. W. 621, and *Moran v. St. Paul*, 54 Minn. 279, 56 N. W. 80.

The words implied in a chapter "claim for damages" were held to mean such claims as the charter authorized the city to audit and pay. The object was to give the city the option of examining into the merits of the claim and paying it without an action, if deemed proper. In view of the fact that the charter expressly declares that the city shall not be liable for

notice to the municipality in substantial compliance with the controlling law is usually held to be a condition precedent to the maintenance of the action.³⁰

claims of the character herein described it cannot be held that it was in the legislative mind to require the presentation to the council of a claim which it was expressly prohibited from paying. To do so would be to require the performance of a vain and useless ceremony. *Caviness v. Vale*, 86 Or. 554, 169 Pac. 95, 97.

Statute required notice of the injury, and made failure to give a valid defense. "The city is not entitled to notice under the act where the injury complained of is the direct and open result of an act committed by the city itself. In such case the municipality entitled to the notice must know of the injury, and hence notice would be unnecessary." But it does apply for failure of a contractor doing public work on the streets to guard or give warning of an excavation. The city may have known of the excavation as a result of its contract with the contractor but it could not know of the negligence of the contractor in failing to give warning. His failure produced a "negligent condition" of the street within the meaning of the act. Hence, city entitled to notice under the statute. *Hughes v. Nashville*, 137 Tenn. 177, 192 S. W. 916.

³⁰ *Illinois. McQuaid v. Warsaw*, 201 Ill. App. 136.

Indiana. French Lick v. Allen, 63 Ind. App. 649, 115 N. E. 79.

Kansas. McHenry v. Kansas City, 101 Kan. 180, 165 Pac. 664.

Missouri. Reno v. St. Joseph, 169 Mo. 642, 654, 70 S. W. 123; *Lyons v. St. Joseph*, 112 Mo. App. 681, 87 S. W. 588; *Canter v. St. Joseph*, 126 Mo. App. 629, 634, 105 S. W. 1; *Jacobs v. St. Joseph*, 127 Mo. App. 669, 106 S. W. 1072.

New York. Purdy v. New York, 193 N. Y. 521, 86 N. E. 560.

Washington. Haynes v. Seattle, 83 Wash. 51, 145 Pac. 73.

Actual knowledge of the municipal officers of all the circumstances of the injury, will not dispense with notice. *Reid v. Kansas City*, 195 Mo. App. 457, 192 S. W. 1047; *Cawthon v. Houston* (Tex. Civ. App.), 212 S. W. 796.

Written reports of the accident by police officers, as the law requires, will not obviate the necessity of notice. *Reid v. Kansas City*, 195 Mo. App. 457, 192 S. W. 1047.

Should be strictly construed as to the requirement of the notice within the time specified and the officer to whom given. *Reid v. Kansas City*, 195 Mo. App. 457, 192 S. W. 1047.

Street construction adopted. *Dallas v. Shows* (Tex. Civ. App. 1919), 212 S. W. 633.

As requirement is in derogation of a common right the law should not be given a literal construction. *Titus v. Montesano* (Wash. 1919), 181 Pac. 43.

A city as a governmental agency of the state is subject to such liabilities only as are imposed by

The common legal requirements are (1) that the notice must be in writing, (2) given to a named officer, as the mayor, (3) within a specified time from the date of the injury, and such notice must state with reasonable certainty, (4) the place where (5) the time when such injury was received, (6) the general character and circumstances of the injury, and (7) that the person so injured will claim damages therefor from the city.³¹ The waiver of the requirement is not sanctioned,³² although certain defects in the notice given may be waived, as contradistinguished from waiver of absence of notice.³³

§ 2715. Same—object and purpose.³⁴

§ 2716. Same—excuses for failure to give notice.

The rule in Washington appears to be that there can be no recovery where the claim is not presented within

law. *Berry v. Helena* (Mont. 1919), 182 Pac. 117.

³¹ *Reid v. Kansas City*, 195 Mo. App. 457, 460, 192 S. W. 1047. See § 2718 to 2718d, post.

³² *Berry v. Helena* (Mont. 1919), 182 Pac. 117; *Tonhey v. Decatur*, 175 Ind. 98, 93 N. E. 540; *White v. Nashville*, 134 Tenn. 688, 185 S. W. 721; *Berry v. Helena* (Mont. 1919), 182 Pac. 117.

Mayor cannot waive. *Rich v. Eastport*, 110 Me. 537, 539, 87 Atl. 374.

City counselor cannot waive. *Reid v. Kansas City*, 195 Mo. App. 457, 463, 192 S. W. 1047.

Sufficiency of facts constituting waiver. *Winter v. Niagara Falls*, 190 N. Y. S. 198, 82 N. E. 1101.

As city cannot waive, hence no pleading filled by it can have such effect. *Cross v. Chicago*, 195 Ill. App. 86.

Waiver of notice. *Warner v.*

Wyandotte, 175 Mich. 695, 141 N. W. 568.

If notice may be waived at all, it may be done only by the council and mayor. *Cawthon v. Houston* (Tex. Civ. App.), 212 S. W. 796.

³³ *Wright v. Portland*, 118 Mich. 23, 76 N. W. 141, 5 Detroit L. N. 413 (verification of claim); *Griswold v. Luddington*, 116 Mich. 401, 74 N. W. 663; *Germaine v. Muskegon*, 105 Mich. 213, 63 N. W. 78.

³⁴ See § 2469, ante.

The purpose of the act was the protection of municipal bodies corporate, sustaining the constitutionality of an act requiring notice, etc., to the municipality of defective condition of street causing injury as a condition to sue. *White v. Nashville*, 134 Tenn. 688, 185 S. W. 721, quoting with approval from § 2714, vol. 6, ante.

“The object of the statute is to afford the city a designation of

the time prescribed, even if the physical and mental incapacity continued through the entire period fixed by the statute for its presentation.³⁵ But in New York, it has been held that where an infant five years of age was injured by the alleged negligence of a village its right of action was not barred because it did not file the notice required within the time prescribed by the statute, under the rule that the law does not seek to compel one to do that which he cannot possibly perform, and that the failure of a father or mother to file the notice is not chargeable to the infant.³⁶

In an Illinois case it was said: "The act is meant to apply only to those who are mentally and physically capable of comprehending and complying with its terms." The court took notice that in many states a strict construction has been given to these statutes and it has been held that it is a matter for the legislature to determine whether there should be any exceptions to such legislation, but affirmed that it would be unreasonable so to construe the statute as to make it appear that the legislature intended to require that to be done which is utterly impossible of performance. Hence, it was held that it does not apply to a child of seven years.³⁷

Laws provide that where by reason of mental or physical incapacity of the one injured to give notice, he may do so after such incapacity disappears.³⁸

the place so that it may examine it and become informed as to the legality and good faith of the claimant's demand, and of the extent of its own liability." *Krueker v. St. Joseph*, 195 Mo. App. 101, 102, 190 S. W. 644.

³⁵ *Haynes v. Seattle*, 83 Wash. 51, 145 Pac. 73.

"The statute provides for no exceptions in case the injured person is unable to give notice. And we do not have the power to engraft an exception upon it." *Reid*

v. Kansas City, 195 Mo. App. 457, 464, 192 S. W. 1047.

³⁶ *Murphy v. Ft. Edwards*, 213 N. Y. 397, 107 N. E. 716, Ann. Cas. 1916C, 1040, affirming 144 N. Y. S. 451, 159 App. Div. 471, 143 N. Y. S. 378, 158 App. Div. 342. See § 2468, ante, where the doctrine of this case is more fully stated.

³⁷ *McDonald v. Spring Valley*, 285 Ill. 52, 120 N. E. 476.

³⁸ "The physical or mental incapacity which enlarges the period of limitation within which notice

§ 2717. Same—time for filing notice.³⁹**§ 2718. Same—sufficiency of notice.⁴⁰**

Under these laws at least four points must be sufficiently covered. The time, place, circumstances of the occurrence and the character of the injury sustained.⁴¹

as a condition precedent to a right to maintain an action must be given, is an inability of the person injured to give the notice himself or through another which results from a loss of the faculties of the mind, or from a lack of power to use the mind because of the loss or impairment of the organs of the body. Mere physical inability to move or to be moved about or to write are not evidence of mental or physical incapacity. * * * Ignorance of facts upon which the ability of the person injured may depend to give notice is not evidence of mental or physical condition; nor is the want of means with which to employ assistance to give the notice or to find out when the accident happened, evidence that the plaintiff was incapable of giving the notice within thirty days because of mental or physical incapacity." *Goodwin v. Fall River*, 228 Mass. 529, 117 N. E. 796, per *Pierce, J.*

Burden rests upon claimant to prove an adequate excuse for failure to give the required notice. *Townsend v. Boston* (Mass. 1919), 122 N. E. 395; *Goodwin v. Fall River*, 228 Mass. 529, 117 N. E. 796.

³⁹ Section 2468, ante. *Hall v. Shenandoah*, 167 Ia. 735, 149 N. W. 831; *Reid v. Kansas City*, 195 Mo. App. 457, 192 S. W. 1047; *Inlagan*

v. Gary, 34 S. D. 198, 147 N. W. 965; *Taylor v. Spokane*, 91 Wash. 629, 158 Pac. 478; *Titus v. Montezano* (Wash. 1919), 181 Pac. 43.

"The courts of this and other states have rigidly enforced the statute requiring this notice within the time limited." *Krucker v. St. Joseph*, 195 Mo. App. 101, 102, 190 S. W. 644.

Although the notice is not dated, it may be shown by other evidence it was served within the time named in the law. *Reno v. St. Joseph*, 169 Mo. 642, 655, 70 S. W. 123.

"Since an action might be brought at any time within the period of limitations, the object of the statute is to give the city opportunity to investigate the case while conditions are fresh and thus protect itself against actions which may be brought long after the occurrence." *Jacobs v. St. Joseph*, 127 Mo. App. 669, 671, 672, 106 S. W. 1072; *Harris v. Newberry*, 128 Mass. 321.

⁴⁰ *McComb v. Chicago*, 263 Ill. 510, 105 N. E. 294, affirming 183 Ill. App. 243; *Casey v. New York*, 217 N. Y. 192, 111 N. E. 764; *Inlagan v. Gary*, 34 S. D. 198, 147 N. W. 965; *Cawthon v. Houston* (Tex. Civ. App. 1919), 212 S. W. 796.

⁴¹ See § 2469, ante.

Time, place and extent of in-

Other requirements are specified in some laws, as that the injured person will claim damages,⁴² and the amount thereof;⁴³ the residence of the claimant at the date of the filing of the notice and for a named period prior thereto;⁴⁴ and sometimes the names and addresses of claimant's witnesses.⁴⁵

Under a law requiring a statement of the precise residence of the claimant by street number at the date of making the claim and for six months immediately anterior to such date, it has been held that, it is sufficient if the notice or claim is not calculated to mislead, but contains such evidence of identity of place and person as to enable the investigating officers to make proper investigation when aided by reasonable inquiry. "When, therefore, there is no evident intention to mislead, but a *bona fide* attempt to comply with the law, the notice is sufficient in the absence

jury. *Maryon v. Atlanta* (Ga. 1919), 99 S. E. 116.

Time, place and cause of injury. *Comery v. White*, 40 R. I. 21, 99 Atl. 756.

"Time, place and circumstances." *Murphy v. St. Paul*, 130 Minn. 410, 153 N. W. 619.

"The place where, the time when such injury was received, and the character and circumstances of the injury." *Hackenyos v. St. Louis*, (Mo.), 203 S. W. 986.

Five essential elements are required by the Illinois statute. 1. The name of the person to whom such cause of action has accrued. 2. The name and residence of the person injured. 3. The date and about the hour of the accident. 4. The place or location where such accident occurred. 5. The name and address of the attending physician (if any). *Swenson v. Aurora*, 196 Ill. App. 83, 89,

following *Reichert v. Chicago*, 169 Ill. App. 493.

⁴² *Rich v. Eastport*, 110 Me. 537, 87 Atl. 374; *Reid v. Kansas City*, 195 Mo. App. 457, 461, 192 S. W. 1047; *Wagner v. New York*, 145 N. Y. S. 683.

However, a notice otherwise sufficient, coming from the injured person himself, was sustained. *Weinstein v. New York*, 141 N. Y. S. 372.

⁴³ *Johnson v. Duluth*, 133 Minn. 405, 158 N. W. 616.

Amount of money claimed as damages, not necessary under Georgia Code (*Maryon v. Atlanta*, Ga. 1919), 99 S. E. 116.

⁴⁴ *Wagner v. Seattle*, 84 Wash. 275, 146 Pac. 621; § 2469, ante.

Residence of claimant for six months last past. *Titus v. Montesano* (Wash. 1919), 181 Pac. 43, 45.

⁴⁵ *Pearl v. Bay City*, 174 Mich. 643, 140 N. W. 938.

of any evidence that it did in fact mislead.”⁴⁶ The purpose of such provisions, as applied to a claim arising from a tort is to enable the municipality to investigate both the claim and the claimant.⁴⁷

Usually actual knowledge of the officers of the city of these facts, or any of them is without effect to dispense with the giving of the notice or with the statement therein of any essential fact.⁴⁸

A reasonable compliance as to the contents of the notice, considering the object of the law, is all that should be required.⁴⁹ However the express provisions of the law should in no event be put out of view.⁵⁰

⁴⁶ *Wagner v. Seattle*, 84 Wash. 275, 146 Pac. 621; *Decker v. Seattle*, 80 Wash. 137, 141 Pac. 338; *Bane v. Seattle*, 80 Wash. 141, 141 Pac. 339; *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449.

⁴⁷ *Frasier v. Cowlitz County*, 67 Wash. 312, 121 Pac. 459.

⁴⁸ *Lyons v. St. Joseph*, 112 Mo. App. 681, 683, 87 S. W. 588; *Canter v. St. Joseph*, 126 Mo. App. 629, 634, 105 S. W. 1; *Reid v. Kansas City*, 195 Mo. App. 457, 463, 192 S. W. 1047.

⁴⁹ *Krucker v. St. Joseph*, 195 Mo. App. 101, 190 S. W. 644; *Reid v. Kansas City*, 195 Mo. App. 457, 192 S. W. 1047.

Notice informal and not technically accurate sustained. *Ack-erret v. Minneapolis*, 129 Minn. 190, 151 N. W. 976.

“Technical accuray in the statement is not required. *Grambs v. Birmingham* (Ala. 1919), 80 So. 874, 876; *McKinnon v. Birmingham*, 196 Ala. 56, 71 So. 463.

⁵⁰ “The notice need not detail the facts elemental to a recovery with the exactness required in a petition. Its function is to impart

information sufficient to enable the city to ascertain the cause relied upon, and when this is done a strict construction of the statute should not be indulged to destroy the efficacy thereof because of formal defects. But after all has been said that can be said in favor of a liberal construction, no interpretation of a statute is permissible that involves the ignoring of its express provisions. The giving of notice is required in every case, regardless of other sources and means of information possessed by the city. It may be sufficient within itself. It is just as imperative to include therein a statement of the manner of injury as it is to give any notice at all. To hold otherwise would open the door to fraud and defeat the purpose of the enactment. A claimant would be permitted to leave the city entirely in the dark respecting the most important fact of all until he chose to bring his suit.” *Lyons v. St. Joseph*, 112 Mo. App. 681, 683, 684, 87 S. W. 588.

The statute required “setting forth his claim for damages and

Some courts incline to favor a liberal construction of these requirements, and will not deny relief when by any reasonable interpretation the notice or statement can be said to be in substantial compliance with the law.⁵¹ And this is the correct view. In passing upon the sufficiency of the notice or statement its object should not be disregarded, and formal rules of construction invoked. It should be remembered that the purpose is to give the proper municipal authorities information which will enable them to ascertain and investigate the facts while the evidence is available, and to determine whether liability exists, and if so, the nature and extent of such liability. While it is true the essential requirements of the law must be observed, the better considered cases hold that a claimant is not barred from maintaining his action because his notice or statement was informal, or not technically accurate, if the information required by the law could, in substance, be ascertained therefrom,⁵² and if such notice or statement was prepared and presented in

specifying the nature of his injuries and the nature and location of the defect which caused such injury." A notice was held defective which made no claim for damages, and which did not specify the nature of the injuries. Knowledge of municipal officers of all that a perfect notice would have shown them is immaterial. "The written statutory notice is an indispensable prerequisite to the right to maintain the suit." *Rich v. Eastport*, 110 Me. 537, 87 Atl. 374.

⁵¹ *Pearl v. Bay City*, 174 Mich. 643, 140 N. W. 938; *Brown v. Owosso*, 126 Mich. 91, 85 N. W. 256; *Ridgeway v. Escanaba*, 154 Mich. 68, 117 N. W. 550; *Comery v. White*, 40 R. I. 21, 99 Atl. 756, 760.

Substantial compliance sufficient.

Weinstein v. New York, 141 N. Y. S. 372, 156 App. Div. 541; *Maggs v. Seattle*, 86 Wash. 427, 150 Pac. 612.

Notice, held insufficient. *Moran v. Salt Lake City (Utah)*, 173 Pac. 702, distinguishing *Bowman v. Ogden City*, 33 Utah 196, 93 Pac. 561.

Description of, and claim of property destroyed. *Lautman v. New York*, 141 N. Y. S. 1042, 157 App. Div. 219.

Typewritten paper with a typewritten signature and without name is not a compliance with a requirement of a verified statement showing in detail the property alleged to have been damaged or destroyed and the value thereof. *Wesley v. New York*, 154 N. Y. S. 461, affirming 151 N. Y. S. 587.

⁵² *Ackeret v. Minneapolis*, 129 Minn. 190, 151 N. W. 976.

good faith, without any design to mislead. A notice which is merely defective may be amended where there was no purpose to mislead the municipality,⁵³ however, the right to amend after the expiration of time for giving notice has been denied.⁵⁴

§ 2718a. Same—time of the accident.

The time of the accident should be accurately stated, since this is an essential element of the notice. An error as to the date of the accident, it is usually held, renders the notice insufficient.⁵⁵ Thus where the injury occurred on one date and the notice stated it occurred on another, the variance, it is generally held, is fatal. The reason advanced is that the action is allowed upon the condition only that the municipality be first notified of the time and place.⁵⁶ However, the decisions as to the necessity of

⁵³ Under a law providing failure to describe correctly the defect which caused the injury would not defeat a right of action where there was no intention to mislead the municipality, and it was not in fact misled, a defective statement or notice may be amended. *Steinke v. Oshkosh*, 159 Wis. 124, 149 N. W. 715, reviewing Wisconsin cases.

⁵⁴ *Berry v. Helena* (Mont. 1919), 182 Pac. 117.

⁵⁵ *Weisman v. New York*, 219 N. Y. 178, 114 N. E. 70, reversing 155 N. Y. S. 418, 169 App. Div. 558; *Berry v. Helena* (Mont. 1919), 182 Pac. 117.

"Time is often an important element in the identification of a given transaction. For all practical purposes, an event which begins and ends on any given day is quite distinct from, and quite another than an event which begins and end another day. Doubtless, the extent of injury might be with

reasonable ease identified without a statement of the time, but the Legislature, for reasons of its own, has seen fit to prescribe and make essential the statement of the time of the injury, and we cannot dispense with it by construction. To do so would be to repeal the statute, rather than to ascertain what it means. The statute, then requires the time of the injury to be stated in the notice and the natural and ordinary mode of stating the time of an event which begins and ends within the compass of a day, unless more particularity is required, is to state the day on which it occurred, together with the month and year, in the common and ordinary manner, and this we think is what the legislature intended by the word 'time,' as used in the statute in question." *Gardner v. New London*, 63 Conn. 267, 28 Atl. 42.

⁵⁶ *Larkin v. Boston*, 128 Mass. 521.

stating the precise date of the accident, irrespective of slight error, and its effect, if any, are not uniform.⁵⁷

It has been held that the date of the injury stated in the notice must conform to the date as shown by the evidence at the trial, and that a failure of proof in this respect is fatal to recovery. If the evidence on the point is undisputed the question is one of law, otherwise it is one of fact.⁵⁸

Where two dates were given, one of which was correct, held notice was not misleading. *Canter v. St. Joseph*, 126 Mo. App. 629, 634, 636, 105 S. W. 1.

Variance of three days. *Gardner v. New London*, 63 Conn. 267, 28 Atl. 42.

Omission of year. *White v. Stowe*, 54 Vt. 510.

Injury occurred Dec. 1908, and the notice gave the date as Jan. 29, 1909, held fatal variance. *Carter v. St. Joseph*, 152 Mo. App. 503, 133 S. W. 851.

Variance of one day, held fatal. *Anthony v. St. Joseph*, 152 Mo. App. 180, 133 S. W. 371.

Error of one day as to the time of the accident, held not fatal. *Murphy v. St. Paul*, 130 Minn. 410, 153 N. W. 619.

The statute required the notice to state "the time when such injury was received." A statement of the date as occurring "on or about the 1st day of September, 1913, about 11 A. M.," when the accident occurred September 2nd of that year, was held fatally defective as imparting no notice. *Hackenyos v. St. Louis (Mo.)*, 203 S. W. 986, containing a dissenting opinion which declares the reason-

able construction of the requirement.

Notice that the injury occurred "on or about," and date named, held insufficient. *Reese v. St. Louis (Mo. 1919)*, 216 S. W. 315, following *Hackenyos v. St. Louis (Mo.)*, 203 S. W. 986.

⁵⁷Slight difference as to, not fatal. *Sullivan v. Syracuse*, 77 Hun. (N. Y.), 440, 29 N. Y. S. 105; *Connor v. Salt Lake City*, 28 Utah 248, 78 Pac. 479.

The accident occurred January 24, and notice stated January 22; held notice was insufficient as the true date of the accident was not given. *Berry v. Helena (Mont.)*, 182 Pac. 117.

Notice that injury occurred October 16, and evidence that it happened October 18th or 19th, held not fatal if city was not harmed. The requirement is "in derogation of common right, and ought not to be given a literal construction when such a construction will operate to deny such rights, and when the city will in no manner be injured thereby." *Titus v. Montezano (Wash. 1919)*, 181 Pac. 43, 47, per Fullerton, J.

⁵⁸*Ft. Wayne v. Bender*, 57 Ind. App. 689, 105 N. E. 949.

§ 2718b. Same—the place of the accident.

The place of the accident should be described in the notice with reasonable precision so far as practicable that it may be identified readily.⁵⁹ However, absolute accuracy of description is not required.⁶⁰

A description that the injury occurred upon a street which did not exist, it has been held, is equivalent to no description of the place. A claim stating an impossible place is insufficient.⁶¹ Giving the name of a street by the

⁵⁹ *Titus v. Montesano* (Wash. 1919), 181 Pac. 43, 45; *Sweeney v. New York*, 225 N. Y. 271, 122 N. E. 243; *Purdy v. New York*, 193 N. Y. 521, 86 N. E. 560; *Walker v. New York*, 134 N. Y. S. 689; *Collins v. New York*, 173 N. Y. S. 451; *Cronin v. Boston*, 135 Mass. 110.

Omission of city, county and state in a notice, perfect in other respects, is not fatal. *Kelley v. St. Joseph*, 170 Mo. App. 358, 361, 156 S. W. 804.

⁶⁰ Section 2469, ante.

Holmes v. Kansas City, 101 Kan. 785, 168 Pac. 1110, following *Cook v. Topeka*, 75 Kan. 534, 90 Pac. 244.

Stating "a pile of dirt" as the place of injury will sometimes be sufficient. *Werner v. Rochester*, 77 Hun. (N. Y.) 33, 28 N. Y. S. 226.

Stating the place as a "decayed and defective portion of the sidewalk," held sufficient. *Meyer v. Tonowanda*, 183 N. Y. 338.

A notice stating the place between two points fifty rods apart and which pointed out that the cause of the injury was a stump projecting four inches above the walk, and from the evidence it appeared there was one stump only between the points, held sufficient.

Lowe v. Clinton, 133 Mass. 526.

A notice stating the place between two points quite a distance apart which specifies a hole in the sidewalk into which the injured party could have stepped, and the evidence showed there was only one hole between the points, held sufficient. *Lincoln v. O'Brien*, 56 Neb. 761, 77 N. W. 76.

A notice stating the place "on the sidewalk on the west side of 24th St., between Jackson St. and Vories St.," held insufficient. "Naming the places as between two streets over four hundred feet apart would not be fatal lossness of description if plaintiff had stated something more which would have served as a guide to the city when it came to examine." *Krucker v. St. Joseph*, 195 Mo. App. 101, 103, 190 S. W. 644.

Description of defect. Loose board on sidewalk, held compliance. *Titus v. Montesano* (Wash. 1919), 181 Pac. 43.

⁶¹ *Walters v. Tacoma*, 88 Wash. 394, 153 Pac. 311, distinguishing *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893, and *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431, wherein the notice approximately described the place.

Sufficiency as to place of injury.

name usually given to it and by which it is generally known is sufficient.⁶²

If the municipal authorities have no difficulty in locating the place of the injury, and making measurements soon after it occurred and thus be enabled to conduct an investigation intelligently, it would seem that the first purpose of the requirement, namely, precise statement of the place of the injury, had been subserved, notwithstanding any vagueness of description in the notice or statement. In brief, in such circumstance, the description would be sufficiently definite to serve the purpose of the case.⁶³ But in a late New York decision, it seems that more should be exacted, where it is said: "The city is entitled to know, not alone where the accident in fact happened, but also where the injured person claimed that it happened. The two points are necessarily and unvariably identical and the rule requiring a particular location to be stated in the notice should not be greatly relaxed merely because the conjectures of the city officials as to its meaning prove accurate."⁶⁴ In event of variance between the notice or statement and the evidence at the trial as to the place of the injury, the question may be submitted to the jury whether the notice was in fact inaccurate, and if so, whether there was any intention on the part of plaintiff to mislead and whether the municipality was or not in fact misled thereby; and in such case the burden is on plaintiff to show that the defendant was not misled.⁶⁵

§ 2718c. Same—how injury occurred.

The circumstances of the accident, or the manner in which the injury occurred, should be so stated in the

Parker v. Pittsfield, 88 Vt. 115, 92 Atl. 24.

Substantial compliance as to statement of place. Comery v. White, 40 R. I. 21, 99 Atl. 756, 760.

⁶² Pearll v. Bay City, 174 Mich. 643, 140 N. W. 938.

⁶³ Beyer v. North Towanda, 183 N. Y. 338, 76 N. E. 214.

⁶⁴ Casey v. New York, 217 N. Y. 192, 111 N. E. 764.

⁶⁵ McCarthy v. Stoneham, 223 Mass. 173, 111 N. E. 698.

notice as to call the attention of the municipality with sufficient distinctness to the defect or obstruction that it may without difficulty locate and identify it or have such information as will enable it to investigate the cause relied upon.⁶⁶

§ 2718d. Same—nature of injury.

The character of the injury received, should in good faith, be plainly stated, in a general way, at least, without details, so that the municipality may have opportunity for inquiry and thereby preclude imposition by false or exaggerated claims.⁶⁷

⁶⁶ *Anderson v. Minneapolis*, 138 Minn. 350, 165 N. W. 134; *Lyons v. St. Joseph*, 112 Mo. App. 681, 87 S. W. 588.

“The purpose of the notice was to give the city such information as would enable it to investigate the cause relied upon; and, if it was sufficient for this purpose, it was sufficient as a condition precedent to maintaining the action (*Lowe v. Clinton*, 133 Mass. 526). The notice states, as the cause of the injury, a fall ‘consequent upon the icy and slippery condition of the said sidewalk.’ It is true that a sidewalk may be icy and slippery without being defective. (*Stanton v. Springfield*, 12 Allen 566). It is equally true that the ice on a sidewalk may be in such form as, combined with its slipperiness renders the way defective. (*Luther v. Worcester*, 97 Mass. 268). It was not necessary that the notice should designate the cause of the injury as a defect. (*Savory v. Haverhill*, 132 Mass. 324). And it should not be construed with technical strictness. (*Spellman v. Chicopee*, 131 Mass. 443). We are of

opinion that the notice in this case called the attention of the city with sufficient distinctness to the cause relied upon to answer the purpose required; and that it was not necessary that it should state with such particularity the form of the ice as to show that it was necessarily a defect.” *Dalton v. Salem*, 136 Mass. 279.

⁶⁷ *Jacobs v. St. Joseph*, 127 Mo. App. 669, 671, 106 S. W. 1072.

“It seems that plaintiff gave two notices to the city, one just after the accident and one just before the expiration of the sixty days limited by the statute. The latter referred to the same injuries mentioned in the first notice and then enumerated others as resulting from her fall. The defendant city objected to the notices, claiming that they did not comply with the statute; and that plaintiff was bound by the first one given. There is no merit in either objection. The object of the statute was to require a notice of the time and place of the accident and its general nature and the attending circumstance in a general way, so that

the city could have opportunity for examination and injury and thereby avoid imposition by false or exaggerated claims."

"It was not intended to confine the injured party at the trial, to just the kind and nature of injuries which may in good faith be mentioned in the notices. There may be latent injuries unknown to the party and many additional injuries or consequences may develop out of those which are known after time limited has expired. It was not intended to confine an injured party, who has acted in good faith, to the specific injuries mentioned. In this view it is apparent that there could be no good reason for objecting to the second notice, for though it may have been necessary defendant should have welcomed it rather than make complaint." *George v. Edelbrock*, 97 Mo. App. 56, 62, 63.

The notice with respect to the injury is as follows: "I slipped and fell and was permanently injured; said accident occurred by reason of snow and ice being allowed to accumulate and remain on said sidewalk; said injuries consist of wounds and bruises of the sciatic nerve on my left hip and thigh." In sustaining the notice the court said: "It is also urged that the notice does not state all the facts in relation to the side-

walk and plaintiff's injury, as fully as these matters are stated in the petition, nor sufficient facts to show the liability of the city. The notice is only required to state the time and place and the character and circumstances of the injury. It is intended for the benefit of the city in order to put its officers in possession of the salient facts upon which the claim for damages is predicated, and the place where the injury is alleged to have occurred, in order that they may investigate them, and thereby ascertain whether the claim be a just one or fictitious and fraudulent, and to this end it was not necessary that the injury to its fullest extent, scope and effect be set forth in the notice, but a substantial compliance with the statute was all that was necessary. It is not claimed that the notice was intended to deceive." *Reno v. St. Joseph*, 169 Mo. 642, 655, 70 S. W. 123.

Notice must "reasonably describe the injury." "To say that the injury was a fracture of the arch of the foot is such a reasonable description, although it may not be technically accurate from a surgeon's point of view." *Titus v. Montesano* (Wash. 1919), 181 Pac. 43, 45.

Injury to automobile. *Steinhaus v. New York*, 179 N. Y. S. 195.

CHAPTER 54.

MUNICIPAL LIABILITY FOR DEFECTIVE STREETS.

- I. GENERAL RULES.
- II. PARTICULAR STREETS AS TO WHICH LIABILITY EXTENDS.
- III. PARTICULAR PARTS OF STREETS TO WHICH LIABILITY EXTENDS.
- IV. LIABILITY FOR ACTS OF OTHERS.
- V. WHO MAY SUE.
- VI. PARTICULAR CONDITIONS AS CAUSE OF INJURY.
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 - b. Driveway.
 - c. Sidewalks.
 - d. Crosswalks.
- VII. DUTY TO GUARD AND WARN AGAINST DANGER.
- VIII. NOTICE OF DEFECTS.
- IX. CONTRIBUTORY NEGLIGENCE.
- X. PROXIMATE CAUSE.

I. GENERAL RULES.

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| <p>§ 2719. Liability in general.</p> <p>§ 2720. Same—general rule applicable to cities, villages, and incorporated municipalities.</p> <p>§ 2721. Same—minority rule.</p> <p>§ 2722. Same—liability as imposed, limited or precluded by statute or charter.</p> <p>§ 2723. Same — states in which there is no liability, common law or statutory.</p> <p>§ 2724. Extent of liability and essentials of cause of action.</p> <p>§ 2725. Purposes for which streets must be kept in condition.</p> | <p>§ 2726. Not liable unless negligent: “reasonable” care necessary.</p> <p>§ 2727. Prior accident at same place as sufficient to show negligence.</p> <p>§ 2728. Duty cannot be delegated so as to shift responsibility.</p> <p>§ 2729. Necessity of lapse of time between notice of defect and time of accident.</p> <p>§ 2730. Miscellaneous matters held not defense.</p> <p>§ 2732. Same—lack of funds to repair.</p> |
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II. PARTICULAR STREETS AS TO WHICH LIABILITY EXTENDS.

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| § 2733. Streets must be public highways. | § 2737. Streets and walks in outlying districts. |
| § 2734. Same—streets outside municipal limits. | § 2738. Streets in property annexed. |
| § 2735. Streets not opened or improved. | § 2739. Injury outside of street limits. |
| § 2736. What included within term "street." | |

III. PARTICULAR PARTS OF STREETS TO WHICH LIABILITY EXTENDS.

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| § 2742. "Width" of way as to which duty extends. | § 2745. Same—failure to construct sidewalks as distinguished from failure to repair. |
| § 2743. Sidewalks. | |
| § 2744. Same—sidewalks partly or wholly outside limits of streets. | § 2748. Alleys. |
| | § 2749. Bridges. |

IV. LIABILITY FOR ACTS OF OTHERS.

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| § 2750. May be liable for the acts of third persons. | § 2752. Same—licenses for amusements, shows or fireworks in streets. |
| § 2751. Liability for negligence of licensee. | § 2752a. Same—permitting racing in streets. |

V. WHO MAY SUE.

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| § 2754. Right to sue is limited to "travelers." | § 2758. Automobilists. |
| § 2757. Children. | § 2759. Bicycle and triecyle riders. |

VI. PARTICULAR CONDITIONS AS CAUSE OF INJURY.

a. In general.

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| § 2766. Defects in plans. | § 2774. Openings or obstructions close to street. |
| § 2767. Obstructions. | |
| § 2768. Same — obstructions between driveway and sidewalk. | § 2775. Overhanging and falling objects. |
| § 2769. Openings, excavations, holes and the like. | § 2776. Same—falling of tree or limb. |
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| § 2771. Moving objects. | |
| § 2772. Defects outside limits of street. | |

b. Driveway.

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| § 2779. In general. | § 2781. Obstructions. |
| § 2780. Openings, holes, excavations, etc. | § 2783. Objects frightening horses. |

c. Sidewalks.

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| | § 2788. Excavations and openings. |
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d. Crosswalks.

- § 2791. What defects actionable in general.

VII. DUTY TO GUARD AND WARN AGAINST DANGER.

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| § 2795. General rule. | § 2801. Same—persons coming on street from private property or way. |
| § 2796. Same—dangers created by third persons. | |
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VIII. NOTICE OF DEFECTS.

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| § 2807. Necessity for. | § 2811. Actual notice. |
| § 2808. Same—notice not necessary where original negligence that of municipality. | § 2813. Constructive notice. |
| | § 2814. Same—constructive notice based on length of time. |
| § 2809. Same—where original negligence that of licensee. | § 2815. Same—latent defects. |
| § 2810. Notice to particular persons as imputed to municipalities. | § 2817. Rules as to notice applied to snow and ice. |
| | § 2818. Question of fact. |

IX. CONTRIBUTORY NEGLIGENCE.

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| § 2820. Contributory negligence is defense. | § 2822. Same—amount of care distinguished from degree of care. |
| § 2821. Ordinary care is test. | |

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| <p>§ 2823. Same—amount of care as dependent on circumstances.</p> <p>§ 2824. Right to assume that street is safe.</p> <p>§ 2825. Duty to observe patent defects.</p> <p>§ 2826. Effect of knowledge of defects or dangers.</p> <p>§ 2827. Same—forgetfulness.</p> <p>§ 2828. Same—choice of ways.</p> <p>§ 2829. Traveling at night.</p> <p>§ 2830. Pedestrian not on sidewalk or crosswalk.</p> | <p>§ 2831. Same—crossing street other than on crosswalk.</p> <p>§ 2834. Negligence as attributable to persons under disability—children as negligent.</p> <p>§ 2835. Same—blind or infirm persons.</p> <p>§ 2836. Same—intoxicated persons.</p> <p>§ 2838. Particular acts as contributory negligence.</p> <p>§ 2839. Imputed negligence.</p> <p>§ 2840. Burden of proof.</p> <p>§ 2841. Question of fact or law.</p> |
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X. PROXIMATE CAUSE.

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| <p>§ 2843. Defect in street must be proximate cause.</p> <p>§ 2845. Concurring and intervening causes: defect in street need not be sole cause.</p> <p>§ 2846. Same—Massachusetts rule.</p> <p>§ 2848. Same—act of injured person as concurring cause.</p> | <p>§ 2851. Same—application of rule where concurring cause is slippery condition, snow, ice, oil, etc.</p> <p>§ 2854. Same—run away horse as proximate cause.</p> |
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I. GENERAL RULES.

§ 2719. Liability in general.¹

§ 2720. Same—general rule applicable to cities, villages, and incorporated municipalities.

Apart from statute, late decisions in a majority of the states, affirm municipal liability to private action for injuries resulting from defective public ways.² In such

¹ "Although the legal principles that must control the disposition of the countless cases of this character are few and simple, the facts of each particular case distinguish it from almost every other of the same kind, and as a consequence the result in each case follows from the application of the

same legal principles to a constantly differing state of facts." *Halliday v. Booth & Flinn*, 62 Pa. Super. Ct. 147, 149.

² *Alabama*. "Municipal liability * * * arises by necessary implication from legislative enactments on the subject of municipal powers and authority over

case it is generally regarded that implied municipal liability exists.

streets." *Grambs v. Birmingham* (Ala. 1919), 80 So. 874; *Bessemer v. Whaley*, 187 Ala. 525, 65 So. 542.

Indiana. Duty to use reasonable care to keep its streets, including the sidewalks thereof, in a reasonably safe condition for travel. *Terre Haute v. O'Neil* (Ind. App. 1920), 126 N. E. 26.

In Alabama, cities and towns are liable for injuries resulting from defective ways when not expressly, made so by statute. *Montgomery v. Ross*, 195 Ala. 362, 70 So. 634.

District of Columbia. The commissioners of the District of Columbia, having full control of the streets, are under a duty in the exercise of ordinary care to keep the public ways of the city in such condition that they can be used with reasonable safety. Rule applied to a public alley. *Scheuch v. District of Columbia*, 44 App. D. C. 118.

Idaho. *Baillie v. Wallace*, 24 Idaho 706, 135 Pac. 850, 852, following *Carson v. Genesee*, 9 Idaho 244, 74 Pac. 862, 108 Am. St. Rep. 127.

Illinois. *Sherwin v. Aurora*, 257 Ill. 458, 100 N. E. 938, affirming 168 Ill. App. 320; *Hanrahan v. Chicago*, 289 Ill. 400, 124 N. E. 547, affirming 209 Ill. App. 630.

Kansas. *Hibbard v. Wichita*, 98 Kan. 498, 159 Pac. 399, L. R. A. 1917A, 399, quoting with approval from § 2720, p. 5290, vol. 6, ante. See *Everly v. Gas*, 95 Kan. 307, 308, 147 Pac. 1134, L. R. A. 1915E, 448.

The rule in Kentucky, "as established by an unbroken line of cases,

is that a municipality must exercise ordinary care to keep and maintain its streets and sidewalks, after they have been taken over by the city, in reasonably safe condition for the character of travel for which they are intended, and if it should fail to do this, it will be liable to the one suffering damages thereby." *Tudor v. Louisville*, 172 Ky. 429, 189 S. W. 456, 458; *Eagan v. Covington*, 166 Ky. 825, 179 S. W. 1026; *Gnau v. Ackerman*, 166 Ky. 258, 179 S. W. 217; *Louisville v. Haugh*, 157 Ky. 643, 163 S. W. 1101.

Minnesota. "In establishing, maintaining and caring for streets, highways and public parks, a municipality acts in its governmental and not in its proprietary capacity." *Ackeret v. Minneapolis*, 129 Minn. 190, 151 N. W. 976.

It is a firmly established rule in Minnesota "and in most of the Middle and Western states that a city is liable for injuries resulting from defects or dangerous conditions of its streets. The reason assigned for making a distinction between such cases and those governed by the general rule are various and not very satisfactory." *Ackeret v. Minneapolis*, 129 Minn. 190, 151 N. W. 976.

Missouri. Duty to maintain street is ministerial. *Henson v. Kansas City* (Mo. 1919), 210 S. W. 13; *Moxley v. Pike County*, 276 Mo. 449, 208 S. W. 246.

Nebraska. *Chaney v. Riverton* (Neb. 1920), 177 N. W. 845.

Oregon. "In the actual construction and maintenance of streets and sidewalks, the city, acting by

§ 2721. Same—minority rule.³

§ 2722. Same—liability as imposed, limited or precluded by statute or charter.

The legislature has power in the absence of constitutional restriction, to exempt municipal corporations absolutely from liability for defects in streets due to negligence of its servants.⁴ However, a legislative act applic-

servants employed by its officers with the authority of the municipality, is engaged in a purely ministerial duty, and is liable to respond in damages for and injury caused by the negligent act or omission of such officers or employers in improperly building the sidewalk and knowingly failing in its duty to keep the same in a reasonably safe condition for travel." *Rider v. La Grande*, 73 Or. 227, 144 Pac. 471.

"County roads and city streets and sidewalks, when once constructed, are for the benefit of all people who may have occasion to travel or pass along or across such highways, the duty to repair which is also imposed upon the municipal corporation for the benefit of the entire public, and not for the sole advantages of the citizens residing in the immediate neighborhood specially benefited thereby." *Humphrey v. Portland*, 79 Or. 430, 154 Pac. 897, 902, quoting part of § 2721, vol. 6, ante.

Pennsylvania. *Short v. Carbondale*, 249 Pa. 564, 95 Atl. 254.

Tennessee. Negligence to keep streets in safe condition for travel creates municipal liability in Tennessee. *Fleming v. Memphis*, 126 Tenn. 331, 148 S. W. 1057.

Washington. "A city is, of

course, as a general rule, liable for negligence in the care of its streets." *Zellers v. Seattle Lodge*, 94 Wash. 32, 161 Pac. 834.

Liability exists for injuries sustained upon sidewalks, streets and public places. This is an exception to the rule exempting municipalities from liability for negligence in the matter of governmental functions. *Taylor v. Spokane*, 91 Wash. 629, 158 Pac. 478, 480, quoting from and approving *Cunningham v. Seattle*, 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629, 7 Ann. Cas. 805.

³ After quoting part of § 2721, vol. 6, ante, ending with note 33, it is said: "The rule thus asserted, though in conflict with some judicial expression upon the subject, is supported by the great weight of authority." *Humphrey v. Portland*, 79 Or. 430, 154 Pac. 897, 902.

New Hampshire. "A traveler who is injured by a defect in a highway is remediless at common law." *Hickey v. Berlin*, 78 N. H. 69, 96 Atl. 295.

Vermont. Liability must be imposed by statute. *Latulippe v. Burlington* (Vt. 1919), 108 Atl. 425.

⁴ *Minton v. Syracuse*, 158 N. Y. S. 470, 474, 172 App. Div. 39, following *Mullen v. Middleton*, 187

able to one city only which provided that there should be no liability for injuries to persons or property by reason of defects in streets or alleys or other property under its control was held unconstitutional in Tennessee.⁵

The usual statutory or charter requirement that the city or town shall "keep open and free from obstruction all streets," is generally held to be mandatory.⁶ But obviously to render the municipality liable to private action in such case it must be shown that the municipality has been guilty of some act of omission or commission amounting to a breach of its corporate duty, as prescribed by such requirement.⁷

If the law imposes the duty upon an independent board or commission over which the municipality has no control, to abate and prevent nuisance in the streets and public ways, the municipality can not be held liable for injury

N. Y. 37, 79 N. E. 863, 11 L. R. A. (N. S.) 391, where it is said: "It is by force of the special or statutory charter that municipal corporations come under a liability for a breach of neglect of corporate duties imposed."

See *Bryan v. West Palm Beach* (Fla.), 77 So. 627; *Colby v. Portland*, 85 Or. 359, 166 Pac. 537, 542.

⁵ *Fleming v. Memphis*, 126 Tenn. 331, 148 S. W. 1057.

⁶ *Nessen v. New Orleans*, 134 La. 455, 64 So. 286, 288; *McCormack v. Robin*, 126 La. 598, 52 So. 780, 139 Am. St. Rep. 549.

Idaho statute. Streets "to be kept open and in repair and free from nuisance." *Baillie v. Wallace*, 24 Idaho 706, 135 Pac. 850.

In Massachusetts the statutory duty is to maintain the public ways reasonably safe for travel, repairs, etc. *Kelleher v. Newburyport*, 227 Mass. 462, 116 N. E. 806.

The South Carolina statute allows an action to any person who

shall receive damages in his person or property through a defect in any street. *Burnett v. Greenville*, 106 S. C. 255, 91 S. E. 203.

⁷ Moreover, the duty of the city enjoined by the statute must be considered in the light of the lawful use of the street an abutting landowner may make during its construction of a building on his land. "The city had the right to assume that the owners of buildings abutting the street, or the construction company would exercise a proper degree of care to prevent injury to travelers upon the street." *Holmquist v. C. L. Gray Const. Co.*, 169 Iowa 502, 151 N. W. 828, following *Parmenter v. Marion*, 113 Iowa 297, 85 N. W. 90.

Authority over streets does not impose the obligation to build or to maintain bridges within its limits across streams. *Coffey v. Berkeley*, 170 Cal. 258, 149 Pac. 559.

to a vehicle due to its colliding with building material in the street at night, without light or signal to indicate danger, which constituted an obstruction and a nuisance.⁸

Charter provisions exempting, or limiting the liability of the municipality for injuries resulting from defective streets and sidewalks, and imposing such liability on negligent public officers, or in case of sidewalks, on abutting landowners, are generally sustained as valid and constitutional.⁹ But the fact that abutting land owners are required by statute or charter to construct and keep

⁸ The negligence alleged in the case was the failure of the city to enforce an ordinance, and under the law the power to enforce such ordinance was in the police board and not in the city. The city did not fail to perform a duty imposed upon it. The action was not based on negligence of the city. However, the city was empowered to pass ordinances to protect property. *Taxicab Co. v. Baltimore*, 118 Md. 359, 84 Atl. 548.

⁹ Charter provision exempted city from liability for personal injuries due to defective sidewalks. *Caviness v. Vale*, 86 Or. 554, 169 Pac. 95.

A charter provided that the city shall not in any event be liable for damages to any person for an injury caused by any defect or dangerous place in any sidewalk, cross walk, street, etc., unless the mayor, chairman of the street committee, or street commissioner shall have had actual notice of such defect or dangerous place and a reasonable time thereafter in which to repair or remove such defect or dangerous place before the happening of such accident or injury and in no case shall more than one hundred dollars be recovered as

damages from the city or any such accident or injury. This provision was held not to conflict with the constitutional provision that "every man shall have remedy by due course of law for injury done him in his person, property or reputation." By another section of the charter authority is conferred upon the council to levy, assess and collect taxes, etc., to appropriate for any item of city expenditure and provide for the payment of the expenses of the city; to prevent and remove all obstructions from the streets, alleys, sidewalks, cross walks, public parks and other public places, etc. The council is also empowered to improve or repair any street or alley or any part thereof. The court expressed the opinion that if the injury suffered due to the negligence of the city or its agents should exceed the sum of one hundred dollars "an action may be maintained against the officers of the municipality whose duty it was to cause the street to be repaired, and to see that the highway was kept in suitable condition for public travel. Since such a remedy is availing, the section of the charter referred to does not violate

in repair sidewalks does not relieve the city of its duty to exercise reasonable care and diligence in repairing defects in sidewalks, or its liability for negligence in the discharge of this duty.¹⁰

the clause of the fundamental law of the state. Pullen v. Eugene, 77 Or. 320, 146 Pac. 822, 824.

Charters provide that no recourse shall be had against the city for damage or loss to person or property suffered or sustained by reason of the defective condition of any sidewalk, nor shall there be any recourse against the city for want of repair of any sidewalk, nor shall there be any recourse against the city for damage to person or property sustained by reason of accident on sidewalk, but in such case the person or persons upon whom the law may have imposed the obligation to repair such defect in the sidewalk and also the officer and officers through whose official negligence such defect remains unrepaired shall be jointly and severally liable to the party injured for the damage sustained. The duty to keep the sidewalk repaired and liability for injuries from defects is imposed on abutting owners. Such charter provisions have been sustained as constitutional although the constitution declares that a right of action to recover damage for any injury sustained cannot be abridged by legislation so as to deprive the injured party of all remedy. Humphrey v. Portland, 79 Or. 430, 154 Pac. 897, 902.

"It may well be doubted whether it is competent for the charter making power to take away from plaintiff a complete remedy

against the city which is always solvent and responsible and whittle it down to the point whether plaintiff will have a partial and doubtful remedy against the city officers, or against a subordinate officer whose position is perhaps a little lower than a deputy inspector and a little higher than that of the dog catcher. To the writer it seems that such a conclusion is contrary to justice and in direct opposition to the doctrine laid down in Batdorf v. Oregon City, 53 Or. 402, 100 Pac. 937, 18 Ann. Cas. 287.

* * * The city, under the doctrine of respondeat superior, would be liable for the negligence of any officer authorized by it to see to the repairs of the street, or perhaps for a failure to designate such officer. The mayor and commissioners, on the other hand, as heretofore observed, are not liable if they have used reasonable diligence to provide funds for such repair and to see that a system of inspection and report of repair of walks is provided for, and competent persons designated to make such inspections and repairs, unless the defection is so glaring and notorious and long continued as of itself to create a presumption of its existence, which is not the case here." Colby v. Portland, 85 Or. 359, 166 Pac. 537, 542, per McBride, C. J.

¹⁰ Key West v. Baldwin, 69 Fla. 136, 67 So. 808, 810, approving

Provisions granting immunity from liability will not be extended by construction. Thus in Florida an act providing that, the city "shall not be liable for personal injuries due to defective condition of its streets or for the malfeasance or nonfeasance of its officers or employees," was held not to exempt the city from action for personal injuries caused by the city placing and maintaining a dangerous obstruction in one of its streets by laying and stretching wires along and upon the street for the purpose of designating a parking place for automobiles over which plaintiff while walking on the street in the night-time tripped and fell.¹¹

The Michigan statute, imposing liability for personal injuries sustained upon any public highway or street and all sidewalks, crosswalks and culverts by reason of neglect to keep the same "in reasonable repair and in condition reasonably safe and fit for travel,"¹² has been held to include travel by automobiles although not in use when the statute was passed.¹³

Pensacola v. Jones, 58 Fla. 208, 50 So. 874.

¹¹ The act "seeks to give to the city immunity from liability for personal injuries caused by the omission to perform, or the improper performance of one of its municipal or private duties, as distinguished from its governmental, and if it is within the power of the legislature to exempt cities from such liability—a question we do not decide in this case—the court should not so extend the privileges and immunities for liability for acts of omission as to include acts of commission which are not specified in the act. The immunity from liability is for damages for personal injuries due to defective condition of the streets, and cannot be extended to obstructions placed in the streets by the city whereby persons rightfully

using them are injured. Every imperfection or irregularity in the surface of a street is not a 'defective condition' in contemplation of the statute, and such an imperfection or irregularity may exist from which itself no injury could result. But the city by placing and maintaining strong wires on the surface of a street may convert such imperfections and irregularities into veritable man-traps, and it cannot escape liability for placing obstructions whereby pedestrians are injured while in the rightful use of a street, under a contention that they constituted a defective condition of the street." *Bryan v. West Palm Beach (Fla.)*, 77 So. 627.

¹² *Brown v. St. John*, 187 Mich. 641, 154 N. W. 79.

¹³ *Cone v. Detroit*, 191 Mich. 198, 157 N. W. 417.

Under the New Hampshire statute,¹⁴ to warrant a recovery negligence on the part of the town must distinctly appear, that is, the town must be in fault either for the defect (in a culvert), or for not knowing it in time to prevent the injury.¹⁵

¹⁴ Set out in § 2722, vol. 6, ante.

Dangerous embankment, within the statute is a question of fact. "In so far as persons traveling on foot are concerned a regular slope of one foot in six is not in and of itself a dangerous embankment." *Leslie v. Keene*, 78 N. H. 607, 101 Atl. 661.

¹⁵ The action was for injuries alleged to have been caused by a defective highway culvert. The wagon in which plaintiff was riding stopped so suddenly that he was thrown out and received the injury. An examination disclosed that the highway was washed out to a depth of about two feet for a distance of three feet on either side of a plank culvert in the highway leaving the culvert intact. The court said there was nothing to show that the city ought to have anticipated that the culvert would not be large enough to take care of the water that would accumulate at that point. "From all that appears there never had been any trouble either with this culvert or the one for which it was substituted. In short, if it can be found that the original culvert was insufficient from the fact it was subsequently enlarged, there is nothing to show that the culvert as enlarged was not such a one as the ordinary man would have maintained at this place. It must be held therefore that this washout was an accident in so far as the

city is concerned." The complaint made was that the culvert was insufficient. "The question, therefore, on this branch of the case is whether there is any evidence tending to prove that the culvert was insufficient. The test to determine the sufficiency of the culvert is not to inquire whether it caused the washout, but whether it was such a culvert as the ordinary man would have maintained at this place; for, while the statute makes it the duty of towns to maintain sufficient culverts, it is held that they perform their duty in this respect if they maintain such a culvert as the ordinary man would maintain in a similar situation."

The test to determine whether the town was in fault for the accident is to inquire whether it would have known of the washout in time to prevent the accident, if it had used ordinary care. While it would have been enough to charge the town to show that this culvert was defective as originally constructed, that is not true when the damages are caused by an accidental defect, or a defect arising without the city's fault. In such case the plaintiff must show not only that the defect was the cause of his injury, but also that the city was in fault for not discovering it in time to prevent the accident. That is, to charge the city it must appear that the city was in fault

The New Jersey statute imposing liability on townships has been held not applicable to boroughs.¹⁶

The West Virginia statute reads: "Any person who sustains an injury to his person or property by reason of a public street * * * sidewalk * * * in any incorporated city, town or village, being out of repair, may recover all damages sustained by him by reason of such injury," etc. This statute, it has been held, imposes an absolute duty on municipalities for injuries sustained on account of public streets and sidewalks being out of repair or obstructed in such a manner as to make it dangerous to travel thereon in the ordinary modes.¹⁷ The word "repair" includes obstructions on the highway, as well as defects in it, without regard to the manner in which or by whom such obstructions were placed there. It applies to obstructions caused by the accumulation of ice and snow. "It is the fact of obstruction, and not the means by which it is accomplished that the law makes actionable."¹⁸ Although under the statute upon a municipal corporation devolves an absolute duty for the defective maintenance of its public thoroughfares, it has been

either for the defect, or for not knowing it. Since, therefore, the washout was an accident, or an occurrence for which the city was in no way in fault, the plaintiff cannot recover unless he shows that if the city had used ordinary care it would have known of the washout in time to prevent the accident.

"Assuming, therefore, that a washout for which the city is in no way in fault is a defect in a culvert within the meaning of the statute, the test to determine whether it can be found that the city is chargeable with the damages the plaintiff sustained is to inquire whether it can be found that the washout occurred so long before the accident that the city either knew or ought to have

known of it in time to prevent the accident." Where there is nothing to show that the accident did not follow the washout so closely that nothing anyone could have done would have prevented the accident, of course, no liability exists. *Hickey v. Berlin*, 78 N. H. 69, 96 Atl. 295.

¹⁶ *Van Valkenburg v. Bergenfield Borough*, 83 N. J. L. 325, 85 Atl. 269, following *Carter v. Rahway*, 57 N. J. L. 196, 30 Atl. 863.

¹⁷ *Post v. Clarksburg*, 74 W. Va. 48, 81 S. E. 562, 52 L. R. A. (N. S.) 773.

¹⁸ *Boyland v. Parkersburg*, 78 W. Va. 749, 90 S. E. 347, 349, 350; *Stanton v. Parkersburg*, 66 W. Va. 393, 66 S. E. 514.

held that it does not necessarily follow that a municipality is liable for injury done by persons using its streets in a lawful and proper manner. If the injury is caused by the negligence of the owner of the property improved, or by the contractor engaged in making the improvement, or by the employees of either of them, the contractor or owner generally is chargeable primarily with the consequences of the negligent act, although in some circumstances or conditions the municipality may also be liable therefor.¹⁹

The Wisconsin statute recites: "If any damage shall happen to any person, his team, carriage or other property by reason of insufficiency or want of repair of any bridge, sluiceway, or road in any town, city or village, the person sustaining such damage shall have a right to sue for and recover the same against any such town, city or village."²⁰

§ 2723. Same—states in which there is no liability, common law or statutory.²¹

§ 2724. Extent of liability and essentials of cause of action.²²

To create a cause of action against a municipality due to a defective public way the elements are: (1) The duty

¹⁹ Johnson v. Huntington, 80 W. Va. 178, 92 S. E. 344, 346.

²⁰ Superior v. Olt, 239 Fed. 100, 152 C. C. A. 150.

²¹ Humphrey v. Portland, 79 Or. 430, 154 Pac. 897, 902, citing § 2723, vol. 6, ante.

California. "A city was under no duty at common law to build bridges within its limits across bordering streams." Coffey v. Berkeley, 170 Cal. 258, 149 Pac. 559.

Indian Territory. Municipal corporations before statehood, being controlled by the laws of Arkansas

were not liable to individuals for injuries, due to their negligence in the construction and maintenance of streets and sidewalks. Purcell v. Stubblefield, 41 Okl. 562, 139 Pac. 290; Blaylock v. Muskogee, 54 C. C. A. 639, 117 Fed. 125.

²² Dallas v. Halford (Tex. Civ. App. 1919), 210 S. W. 725.

"Clearly the statutory duty of a municipal corporation to keep its streets reasonably safe for use, though absolute does not extend to the prevention of persons lawfully using the streets from injuring one another in the exer-

to exercise ordinary care to keep its public ways in a reasonably safe and convenient condition for travel in the usual modes by day and night;²³ (2) the violation of that duty, as evidenced by the unsafe condition of the public way at the place of the accident; and (3) the injury to the plaintiff.²⁴ A recovery depends upon proof of

cise of their rights." *Post v. Clarksburg*, 74 W. Va. 48, 81 S. E. 562.

"While municipalities are not insurers of the safety of their streets, there can be no question about their duty to keep streets in reasonably safe condition for persons traveling in the usual way and exercising due care for their safety. In meeting this obligation the municipality should not neglect any portion of the street, but should see that the street from side to side is reasonably safe." *Higginbottom v. Burnsville*, 113 Miss. 219, 74 So. 133.

The municipality must keep its streets free from obstructions. Permitting the deposit of rubbish on the street by property owners which was to be removed by the municipal authorities, and allowing it to remain an unreasonable time—two hours—constitutes a nuisance rendering the municipality liable for resulting damages. *Lyman v. Potsdam*, 159 N. Y. S. 71, 173 App. Div. 390.

²³ *Alabama. Mobile Light & R. Co. v. Copeland & Son* (Ala. App.), 73 So. 131.

Kentucky. Carlisle v. Campbell, 151 Ky. 279, 161 S. W. 673.

Maryland. Annapolis v. Stalings, 125 Md. 343, 93 Atl. 974.

Massachusetts. Eklon v. Chelsea, 223 Mass. 213, 111 N. E. 866.

Missouri. Bond v. Sedalia (Mo. App.), 194 S. W. 740.

Oklahoma. Bellevue Gas & Oil Co. v. Carr (Okl.), 161 Pac. 203.

Pennsylvania. Levine v. Pittsburgh, 252 Pa. 181, 97 Atl. 392.

Virginia. Richmond v. McCormack, 120 Va. 552, 91 S. E. 767.

United States. Scheuch v. District of Columbia, 44 App. D. C. 118.

²⁴ *Cleveland-Trinidad Paving Co. v. Mitchell*, 42 Okl. 49, 140 Pac. 416.

Action to be brought within the time of limitation prescribed. *Bixby v. Sioux City* (Ia.), 164 N. W. 641.

Sufficiency of petition for injury due to catching foot in planks of a railroad crossing. *Hammond v. Jahuke*, 178 Ind. 177, 99 N. E. 39.

Injury to pedestrian resulting from a billboard on the sidewalk; essential allegations. *Van De Vere v. Kansas City* (Mo. App.), 196 S. W. 785.

Sufficiency of complaint where pedestrian stepped into a hole in the street. *Terre Haute v. Lauda*, 58 Ind. App. 480, 108 N. E. 392.

Sufficiency of statement of a cause of action for personal injury sustained from an alleged defect and unsafe condition of a sidewalk resulting from the construction of a building where a scaffold of planks and timbers ex-

the negligence charged and that the injury was the result of such negligence, or that such negligence was the proximate cause of the injury,²⁵ and a failure to show, as a defense, contributory negligence on the part of the injured person.²⁶

The violation of the duty must result from the fault or negligence of the municipality. It is not liable for a defect in a street arising without its fault or negligence unless it has express notice, or the defect was so notorious as to be evident to passers-by, or had existed for such a period of time so as to constitute constructive notice to the municipality, and the city had time within which to remedy the defect prior to the injury and had failed to do so.²⁷ In brief, the liability of the municipality is founded on its failure to exercise ordinary care to keep its streets reasonably safe for travel and to remedy a condition likely to be dangerous. Thus where the in-

tended over and along the sidewalk and a piece of timber fell therefrom and struck and injured plaintiff while she was passing over the sidewalk. *Johnson v. Huntington*, 80 W. Va. 178, 92 S. E. 344.

See § 2495, ante.

Municipality must (1) owe a duty to the one injured as to public way at the point where the injury occurred, (2) failed to perform such duty, and (3) legal right exists to recover. *Latulippe v. Burlington* (Vt. 1919), 108 Atl. 425.

Where notice required, of the accident. Proper allegation of compliance is an indispensable part of pleading the cause of action. *Berry v. Helena* (Mont.), 182 Pac. 117.

²⁵ The negligence of municipality must have produced injuries complained of. Thus an averment that the injuries resulted from the

city's negligence in permitting a water box or vent, about four inches square and set about two or three inches below the surface, to remain in the pavement, and plaintiff's foot slipped into the hole or depression, throwing her violently on the pavement, etc., must be sustained by proof that she was thrown by reason of her foot slipping into the hole. In such case, negligence and that the injury was the result of such negligence must be shown. *Reddington v. Philadelphia*, 253 Pa. 390, 98 Atl. 601.

²⁶ *Wabash v. Brusco*, 186 Ind. 637, 117 N. E. 867.

²⁷ "The municipality is not obliged to look for defects, the measure of its duty being merely to observe such as a reasonable supervision might disclose." *DuBois v. Pancoast*, 219 Fed. 60, 64, 133 C. C. A. 662.

jury results from the extraordinary slipperiness in the surface of the street due to oiling by direction of the city's superintendent of streets, causing an automobile driven thereon with caution to skid, get beyond control and collide with a milk wagon, it is of no consequence whether or not the city was responsible for the negligence of the one who directed the oil to be spread, since the failure of the city, in the respect, stated "might be found to exist quite independent of its liability for negligence of its superintendent of streets." ²⁸

"The negligence for which the municipality may be rendered liable consists of acts of misfeasance and non-feasance. The former includes faulty construction of the streets or sidewalks so as to render them dangerous for travel, while the latter consists of a failure to repair the street or sidewalk after construction and after becoming unsafe." ²⁹

§ 2725. Purposes for which streets must be kept in condition.

As the municipality is not an insurer against accident,³⁰ nor a guarantor of the safety of travelers,³¹ it need not keep its public ways in a perfect,³² or in an absolutely safe condition,³³ but the general rule, uniformly supported by judicial decisions, is that its duty in this respect is adequately discharged, if it exercises ordinary care to keep them in a reasonably safe condition for

²⁸ *Kelleher v. Newburyport*, 227 Mass. 462, 116 N. E. 806, per Rugg, C. J.

²⁹ *Tudor v. Louisville*, 172 Ky. 429, 189 S. W. 456, 458.

³⁰ Section 2726, post.

³¹ Section 2726, post.

³² "The city is not required to maintain its streets in a perfect condition but only in a reasonably safe condition for travel." *Koch v. Denver*, 24 Colo. App. 406, 133 Pac. 1119.

³³ Reasonable safe condition, not absolutely safe. *Horan v. Independence* (Mo. App.), 176 S. W. 1061.

The city is not bound to keep its streets absolutely safe. It is only required to exercise ordinary care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety. *Gage v. Vienna*, 196 Ill. App. 585, 590.

travel, day or night,³⁴ in the usual modes,³⁵ on foot,³⁶ on horseback,³⁷ or in vehicles,³⁸ whether one kind or an-

³⁴ *Brown v. Milledgeville*, 20 Ga. App. 392, 93 S. E. 25.

"Safe condition for travel." *Miller v. Duluth*, 134 Minn. 418, 159 N. W. 960.

City must exercise ordinary care "to keep its streets in reasonably safe condition for travelers passing over them in any and all modes, provided only (1) such modes are lawful, and (2) do not, of themselves constitute contributory negligence in the traveler to a degree forbidding his recovery." *Hunt v. St. Louis* (Mo. 1919), 211 S. W. 673, 677.

³⁵ *Georgia. Griffin v. Stewart* (Ga. App. 1918), 96 S. E. 219; *Macon v. Smith*, 14 Ga. App. 703, 82 S. E. 162.

Iowa. Allen v. Ft. Dodge (Ia. 1918), 167 N. W. 577.

Idaho. Baillie v. Wallace, 24 Idaho 706, 135 Pac. 850.

Kentucky. Duley v. Smithland, 174 Ky. 248, 192 S. W. 21.

Maryland. Baltimore v. Bassett (Md. 1918), 104 Atl. 39.

Minnesota. Kimball v. Chicago, St. Paul & Mo. Ry. Co., 128 Minn. 95, 150 N. W. 379.

Virginia. Cook's Adm'x v. Danville, 116 Va. 383, 82 S. E. 90.

West Virginia. Johnson v. Huntington (W. Va. 1918), 95 S. E. 1044.

Wisconsin. Rhineschmidt v. To-mah, 162 Wis. 242, 155 N. W. 122.

"Streets and sidewalks must be such that public travel on them may be reasonably secure." *Klipp v. Hoyt*, 99 Kan. 14, 16, 160 Pac. 1000.

³⁶ *Griffith v. Denver*, 55 Colo. 37, 132 Pac. 57; *Sherwin v. Aurora*, 257 Ill. 458, 100 N. E. 938, 43 L. R. A. (N. S.) 1116, affirming 168 Ill. App. 320; *Mills v. Oquawka*, 200 Ill. App. 119; *Hindle v. Joliet*, 200 Ill. App. 159.

In the construction of sidewalks a municipality is not required to use the best material, as this is within its discretion. *Stanka v. Shamokin Borough*, 66 Pa. Super. Ct. 553.

Proper municipal authorities should supervise the construction of walks, although constructed by abutting owners, and must keep them reasonably safe. *Gellenbeck v. Mobridge*, 40 S. D. 157, 166 N. W. 631.

³⁷ "Opening a street or permitting it to remain open through its entire width is an invitation on the part of a municipal corporation to the public to use the same for customary travel, and an individual using such street in the ordinary way has a right to presume that he may go thereon free from any save the usual hazards of travel. If he is exercising ordinary and reasonable care for his own safety, he may assume that the municipality has done likewise; and if, as in the instant case, he is using such street in pursuit of his lawful occupation riding upon a well broken horse ordinarily sure of foot, at no unusual speed, and such animal without fault upon the part of his rider, becomes frightened and temporarily unmanageable, and by reason of com-

other,³⁹ including automobiles,⁴⁰ (but they need not be kept so that they will be especially adapted to the use of bicycles⁴¹ or automobiles therein)⁴² for those using such ways in a proper manner with due care and caution for their own safety.⁴³ The obligation comprehends the use

ing in contact with an obstruction or a defect in the street negligently created or permitted to remain therein by a city, falls and injures such rider, the municipality is liable therefor." *Muskogee v. Miller*, 45 Okl. 414, 145 Pac. 782, 784.

³⁸ *Thubron v. Dravo Construction Co.*, 238 Pa. 443, 86 Atl. 292.

³⁹ The true test is whether or not the city has used ordinary care to maintain its streets in a reasonably safe condition for travel whether in one kind of a vehicle or another. *Bethel v. St. Joseph*, 184 Mo. App. 388, 171 S. W. 42, 44, approving *Bills v. Salt Lake City*, 37 Utah 507, 514, 109 Pac. 745.

⁴⁰ *Kendall v. Des Moines*, 183 Ia. 866, 167 N. W. 684.

"The street upon which the accident occurred was open to public travel, and it was the defendant's duty to keep the same free from obstructions and from nuisances which would interfere with ordinary public travel, and this includes travel by automobiles as well as other vehicles. * * * This obligation includes all parts of the street open to travel, and is an affirmative duty cast upon all cities by statute." *Wolford v. Grinnell*, 179 Iowa 689, 161 N. W. 686, 688.

⁴¹ *Pueblo v. Smith*, 57 Colo. 500, 143 Pac. 281.

See § 2759, post; § 2759, vol. 6, ante.

Not required to construct for bicycles. *Emelle v. Salt Lake City* (Utah 1919), 181 Pac. 266.

⁴² "Cities and towns are required to keep their ways reasonably safe and convenient for travel generally, including that undertaken in automobiles, as well as in horse-drawn vehicles, and if the ways are kept safe for travel generally, they are not obliged to make special provisions to keep them safe for the passage of automobiles and other machines which were unthought of when the laws imposing the general duty of the care of highways and liabilities for defects therein were enacted." *Bond v. Bellerica* (Mass. 1920), 126 N. E. 381, per Carroll, J., holding obligation to erect a railway sufficiently strong to keep an automobile from going over an embankment was not imposed; that a railway to protect travel generally was enough.

⁴³ *Hanrahan v. Chicago*, 289 Ill. 400, 125 N. E. 356; *Elsmere v. Tanner*, 158 Ky. 681, 166 S. W. 220.

The general rule is that, in the exercise of the ordinary care imposed by law, "cities shall construct and keep the streets, under whatever circumstances may arise, in a reasonably safe condition for ordinary travel by those using in a proper manner that particular

of such ways for all proper street purposes,⁴⁴ including their use by children at play.⁴⁵

With reference to persons traveling upon crutches or with canes, it has been said that "the city ought not to be required to keep its walks in such perfect condition that a pedestrian using a cane or crutch would be in no danger of putting it into a small hole, or crevice, or the interstices which unavoidably will appear between stones or boards."⁴⁶ "There is no doubt that the legislature authorized sidewalks for the use of the lame and aged, as well as for the able bodied and young; but we know that the former classes should, and usually do, use greater care than the latter find necessary. A man walking on crutches knows the common method of building sidewalks. He knows that edges of the boards decay and knots drop out, and instinctively he learns to avoid putting his crutches in holes or cracks. We think it is not negligence

part of the highway. Under no conditions can a municipal corporation be regarded as an insurer of the safety of those using the streets." *Pueblo v. Smith*, 57 Colo. 500, 143 Pac. 281.

If slick and slippery, glazed, highly polished, inherently dangerous, bad. *Schmidt v. Newport* (Ky. 1919), 212 S. W. 113.

⁴⁴ The statute of South Carolina allowing actions for damages to persons or property "through a defect in any street" has been held to include the keeping of a street in such physical condition that it will be reasonably safe for street purposes. *Burnett v. Greenville*, 106 S. C. 255, 91 S. E. 203, and following *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363.

⁴⁵ The more liberal rule recognizes the use of streets for recreation and play to be proper and

not at all in the nature of a trespass and treats the municipality as owing to persons so using them a duty of care. *Barrett v. Princeton*, 135 Minn. 56, 160 N. W. 190.

Streets are to be kept in proper condition not only for ordinary travel but also for children at play, using the streets in manner usual to children in crowded urban centers. Therefore, municipal liability arises where a child playing in a street was killed by a cake of ice falling from a wagon, due to the fact that the wagon ran into a hole in the street, and in such case the city is liable irrespective of the negligence of the driver of the wagon, since it permitting the hole in the street was the proximate cause of the accident. *Casey v. Chicago*, 189 Ill. App. 188.

⁴⁶ *Wilkerson v. Sedalia* (Mo. App.), 205 S. W. 877.

for a city to use its plank walks, although they have cracks and knot holes through which a cane or crutch would go, acting upon the expectation that the traveler must know that they are practically unavoidable and are common to all sidewalks, long before they are sufficiently warned to justify pulling them up and building anew. The city has a right, in the maintenance of its walks, to expect a reasonable degree of care from all persons; and when its walks are safe for the ordinarily prudent use, there is no negligence.”⁴⁷

Obviously a municipality is not bound to keep its sidewalks fit for use for vehicles and horses.⁴⁸ That streets and sidewalks may be in a reasonably safe condition for their accustomed use the duty of the municipality requires that it shall exercise ordinary care to keep such public ways free from obstructions or dangers adjoining or so near thereto as to inconvenience, unreasonably interfere with, or imperil the traveler in the exercise of appropriate caution for his own safety in the proper use of such ways.⁴⁹

As to whether a particular street or sidewalk is in a reasonably safe condition for proper purposes, generally speaking, it may be said that courts assign to the municipal authorities a broad discretion,⁵⁰ however, the circumstances in each case as it arises are controlling. Few cases are exactly alike in all respects. If in the given case there is a reasonable basis for a difference of opin-

⁴⁷ *Hardin v. Jackson*, 137 Mich. 271, 100 N. W. 389, 66 L. R. A. 986.

⁴⁸ *Dudley v. Smithland*, 174 Ky. 248, 192 S. W. 21.

⁴⁹ Section 2774, post; § 2774, vol. 6, ante. *Kirkham v. Kansas City*, 89 Kan. 651, 132 Pac. 160. See *Bonny v. New York*, 141 N. Y. S. 8, 156 App. Div. 287.

The duty of a city to keep its streets in a reasonably safe condition does not extend to a cellar

door running from a building to a sidewalk. And this is true although the cellar door was within the line of the street. The plaintiff was standing on the cellar door watching a religious service when the door gave way. The court held there was no municipal liability. *Louisville v. Hayden*, 154 Ky. 258, 157 S. W. 4.

⁵⁰ *Rollins v. Winston-Salem* (N. C. 1918), 97 S. E. 211.

ion among sensible and fair-minded men on the question of the reasonable safety of the street involved, it becomes a question of fact for the determination of the jury.⁵¹

Concerning municipal liability for insufficiency or want of repair of any road, etc., under the Wisconsin statute, it was aptly said: "A sufficient street is at best a relative term. The same care is not required of a city in reference to its carriageway as to its sidewalks. The city is required to keep its streets in a reasonable state of repair, but it meets the duty imposed upon it by the statute when it maintains the respective portions of the street in a reasonably safe condition in the light of the

⁵¹ *Lebanon v. Graves*, 178 Ky. 749, 199 S. W. 1064; *Higginbottom v. Burnsville*, 113 Miss. 219, 74 So. 133.

Whether street safe, etc., usually jury question. *Walters v. Seattle*, 97 Wash. 657, 167 Pac. 124; *Hindle v. Joliet*, 200 Ill. App. 159.

Curb raised above sidewalk over which plaintiff stumbled. *Wertz v. Williamsport*, 67 Pa. Super. Ct. 156.

Elderly woman falling on ice. *Miller v. Clearfield Borough*, 66 Pa. Super. Ct. 394.

"Whether a given street is in a reasonably safe condition for travel is a practicable question, to be determined by the jury in each case by the particular circumstances." *Morgan v. Kirksville*, 181 Mo. App. 348, 168 S. W. 835, 837.

"It seems that the rule is that where the defect in the sidewalk is of such character that reasonable men may come to no other conclusion except that in spite of the defect a sidewalk is in a reasonably safe condition for the travel of pedestrians who are ex-

ercising ordinary care for themselves, there is then no evidence of negligence to be submitted to the jury, and the court ought to direct a verdict for the municipality, from which a recovery is sought; but where the defect in the sidewalk is such that reasonable men might well differ as to whether a sidewalk which is obstructed is reasonably safe for travel by persons exercising ordinary care for themselves, then it is a question for the jury and not for the court." *Dayton v. Lory*, 169 Ky. 94, 183 S. W. 252.

Injury to one mowing grass on a grass plot set apart by the city between the pavement and the walk by stepping upon a lid covering a meter box which was concealed from his sight by the grass and by reason of the fact that such lid was not properly adjusted and fitted into the groove and the tiling made for that purpose, it turned with his weight and he fell and was injured. Whether the city was negligent was held to be a question of fact. *Shawnee v. Drake* (Okl.), 171 Pac. 727.

purpose for which such portions are intended.”⁵² In determining whether the municipality has faithfully discharged its legal obligation as to its public ways the size of the municipality and the amount of travel and traffic over the streets may be considered.⁵³

§ 2726. Not liable unless negligent: “reasonable” care necessary.

Only the exercise of ordinary or reasonable care,⁵⁴ that

⁵² *Superior v. Olt*, 239 Fed. 100, 102, 152 C. C. A. 150.

⁵³ *Higginbottom v. Burnsville*, 113 Miss. 219, 74 So. 133. See § 2726, post; § 2726, vol. 6, ante.

⁵⁴ *Idaho. Smith v. Rexburg*, 24 Idaho 176, 132 Pac. 1153, 1155; *Powers v. Boise City*, 22 Idaho 286, 125 Pac. 194.

Illinois. Brennan v. Streator, 256 Ill. 468, 100 N. E. 266, affirming 168 Ill. App. 134; *Hindle v. Joliet*, 200 Ill. App. 159; *McQuaid v. Warsaw*, 201 Ill. App. 136; *Gage v. Vienna*, 196 Ill. App. 585.

Iowa. Kendall v. Des Moines (Iowa 1918), 167 N. W. 684; *Allen v. Ft. Dodge* (Iowa 1918), 167 N. W. 577.

Indiana. Mooresville v. Spoon (Ind. App. 1918), 118 N. E. 686; *New Albany v. Kiefer* (Ind. App. 1919), 123 N. E. 361.

Kentucky. Bickel Asphalt Paving Co. v. Yeager, 176 Ky. 712, 197 S. W. 417; *Duley v. Smithland*, 174 Ky. 248, 192 S. W. 21; *Gee's Admr. v. Hopkinsville*, 154 Ky. 263, 157 S. W. 30; *Elsmere v. Tanner*, 158 Ky. 681, 166 S. W. 220; *Schmidt v. Newport* (Ky. 1919), 212 S. W. 113; *Lancaster v. Broadus* (Ky. 1919), 216 S. W. 373.

Missouri. Perry v. Sedalia, 168

Mo. App. 235, 153 S. W. 536; *Francis v. West Plains* (Mo. App. 1919), 216 S. W. 808; *Hunt v. St. Louis* (Mo. 1919), 211 S. W. 673; *Albritton v. Kansas City*, 192 Mo. App. 574, 188 S. W. 239; *Starkey v. Greenville*, 189 Mo. App. 352, 175 S. W. 314, quoting part of § 2726, vol. 6, ante.

Montana. Ford v. Great Falls, 46 Mont. 292, 127 Pac. 1004.

Maryland. State v. Baltimore, 129 Md. 686, 99 Atl. 860.

Mississippi. Higginbottom v. Burnsville, 113 Miss. 219, 74 So. 133.

Minnesota. Miller v. Duluth, 134 Minn. 418, 159 N. W. 960.

North Carolina. Smith v. Winton, 162 N. C. 50, 77 S. E. 1093.

New York. Stern v. International Ry. Co., 220 N. Y. 284, 115 N. E. 759, affirming 153 N. Y. S. 520, 167 App. Div. 503.

Ohio. Gibbs v. Girard, 88 Ohio St. 34, 102 N. E. 299.

Oregon. Colby v. Portland, 85 Or. 359, 166 Pac. 537.

Oklahoma. Woodware v. Bowder (Okla.), 149 Pac. 138; *Cushing v. Bowdlear* (Okla.), 177 Pac. 561.

Pennsylvania. Short v. Carbondale, 249 Pa. 564, 95 Atl. 254.

Texas. Ft. Worth v. Nelson (Tex. Civ. App. 1920), 220 S. W.

which an ordinarily prudent man would exercise under like circumstances in maintaining public ways in a reasonably safe condition for travel in the usual modes, day and night, and for the customary street uses is exacted of the municipality.⁵⁵ Late decisions without dissent, follow the well settled rule that, as (often expressed) the municipality is in no event an insurer against accident to

123, citing §§ 2726, 2743, 2744, vol. 6, ante.

Virginia. *Richmond v. McCormack*, 120 Va. 552, 91 S. E. 767.

"It is a principle universally recognized in all the adjudicated cases that municipalities are only required to exercise ordinary care to keep and maintain their streets and sidewalks in a reasonably safe condition for the use of persons exercising ordinary care and caution." *Meridian v. Crook*, 109 Miss. 700, 69 So. 182.

"It is the duty of municipalities to keep its streets reasonably safe for passage in the ordinary modes, and to that end to use reasonable care to keep them free from such obstructions and holes or excavations and will be likely to render their use hazardous to anyone using and exercising due care." *Burke v. District of Columbia*, 42 App. D. C. 438, 441.

Must guard openings in sidewalks kept by abutters by city's permission. *Meyer v. New York*, 139 N. Y. S. 432, 154 App. Div. 713.

"The duty of the municipality is to use reasonable care to keep its streets in a reasonably safe condition for travel thereon by persons using due care and caution for their safety. It is not its duty to keep its streets in a rea-

sonably safe condition for travel, and reasonably free from obstruction." *Gage v. Vienna*, 195 Ill. App. 585, 590; *Osburn v. Mt. Vernon*, 197 Ill. App. 267; *Hebenheimer v. St. Louis*, 269 Mo. 92, 189 S. W. 1180.

An instruction that "it is the duty of the city to keep its sidewalks in a reasonably safe condition for travel" is erroneous. The city's duty is to exercise reasonable care to keep them in such condition. *Albritton v. Kansas City*, 192 Mo. App. 574, 577, 188 S. W. 239, 241.

⁵⁵ Such as would ordinarily be exercised by like or similar cities or towns. *Pugh v. Springdale Borough*, 238 Pa. 361, 86 Atl. 189.

"A municipality is under obligation to maintain the streets in a reasonably safe condition, but is not absolutely required to accomplish this in order to avoid liability. All exacted is that it exercised that degree of care in undertaking so to maintain them as would be exercised by an ordinarily cautious and diligent person under like obligation and in like circumstances. This is the measure of its duty, and liability attaches only when it falls short of this in performance thereof." *Hanson v. Anamosa*, 177 Ia. 101, 158 N. W. 591, 596.

travelers using its public ways,⁵⁶ nor, a guarantor of their safety in the use thereof,⁵⁷ it is not every defect in a street or sidewalk, though it may cause injury, which may be attributed to municipal carelessness.⁵⁸ Injury due to

⁵⁶ Indiana. *Mooreville v. Spoon* (Ind. App.), 118 N. E. 686; *New Albany v. Kiefer* (Ind. App.), 123 N. E. 361.

Illinois. *Kerr v. Danville*, 201 Ill. App. 93.

Kentucky. *Ashland v. Boggs*, 161 Ky. 728, 171 S. W. 461; *Ludlow v. De Vinney*, 185 Ky. 316, 215 S. W. 45.

Missouri. *Jackson v. Kansas City*, 181 Mo. App. 178, 167 S. W. 1150.

North Carolina. *Alexander v. Statesville*, 165 N. C. 527, 81 S. E. 763, 765; *Smith v. Winton*, 162 N. C. 50, 77 S. W. 1093.

⁵⁷ Municipality is not an insurer against accident nor does it guarantee the safety of travelers in its streets. *Starkey v. Greenville*, 189 Mo. App. 352, 357, 359, 175 S. W. 314, citing § 2726, vol. 6, ante.

"A city does not insure or warrant the safe condition of its streets. It must keep and maintain them in reasonably safe condition and exercise ordinary care and due diligence to see that they are so kept and maintained." *Smith v. Winston*, 162 N. C. 50, 77 S. E. 1093.

"The city is not an insurer, and is not obliged to keep its walks in an absolutely safe condition, but only reasonably so for persons using them in the ordinary mode." *Horan v. Independence* (Mo. App.), 176 S. W. 1061, holding an instruction erroneous sub-

mitting to the jury the question whether the crossing "was in an unsafe, dangerous and defective condition."

A city "is neither a guarantor of the perfect condition of the streets and sidewalks, nor of the safety of the traveler on either." *Tudor v. Louisville*, 172 Ky. 429, 189 S. W. 456, 458; *Ashland v. Boggs*, 161 Ky. 728, 171 S. W. 461, Ann. Cas. 1916B, 1005; *Varney v. Covington*, 155 Ky. 662, 160 S. W. 173.

⁵⁸ *Johnson v. Ames*, 181 Iowa 65, 162 S. W. 858, 860.

"Reasonable care to keep the street safe, in view of the extent of territory over which such care is to be exercised, is the measure of duty which the law requires of the city. It is not an insurer of the safety of all pedestrians, and is not rendered liable because the surface of the street is such that it is possible for one to stub his toe and fall." *Engel v. New York*, 146 N. Y. S. 307.

"The law does not hold a city to the exercise of more than reasonable care to keep its streets free from dangerous obstructions. The city is not an insurer of the safety of pedestrians and they must assume the risks attending a general slippery condition of the sidewalks produced by natural causes and which remain despite the efforts of reasonable care and diligence. *Jackson v. Kansas City*, 181 Mo. App. 178, 167 S. W. 1150.

a defective street to be actionable, therefore, must have been the direct result of the neglect, carelessness or failure of the municipality in creating or permitting such defect, or its negligent failure after notice, to remedy the same prior to the happening of the injury.⁵⁹ In brief, apart from statutory or charter obligation, as negligence is essential to create municipal liability in such case,⁶⁰

⁵⁹ Liability does not necessarily follow upon proof of a defect and injury resulting therefrom. "The basis of responsibility is negligence in suffering a defect to remain after it should in reason have been repaired, and notice to the corporation of the defect, or of facts from which notice may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied, is essential to liability." *Bessemer v. Whaley*, 187 Ala. 525, 65 So. 542.

Action for damages due to injuries from stepping into a hole in a sidewalk where a brick had been removed, must allege specific act of negligence, the time and person who removed the brick, etc. *Hills v. New Orleans*, 139 La. 537, 71 So. 797.

⁶⁰ Alabama. *Montgomery v. Ross*, 195 Ala. 362, 70 So. 634.

Illinois. *Weber v. Chicago*, 201 Ill. App. 564.

Idaho. *Smith v. Rexburg*, 24 Idaho 176, 132 Pac. 1153, 1156.

Kentucky. *Elsmere v. Tanner*, 158 Ky. 681, 166 S. W. 220.

Missouri. *Morris v. St. Louis & San F. R. Co.*, 184 Mo. App. 106, 168 S. W. 323; *McIlhenny v. Kansas City*, 188 Mo. App. 218, 175 S. W. 108; *Schlinski v. St. Joseph*,

170 Mo. App. 380, 156 S. W. 823.

New York. *Faber v. New York*, 146 N. Y. S. 295, 161 App. Div. 203.

North Carolina. *Alexander v. Statesville*, 165 N. C. 627, 81 S. E. 763, 765; *Monds v. Dunn*, 163 N. C. 108, 79 S. E. 303.

Wisconsin. *Green v. Reedsburg*, 162 Wis. 101, 155 N. W. 928.

"The negligence for which the municipality may be rendered liable consists of acts of misfeasance and nonfeasance. The former includes faulty construction of the street or sidewalk so as to render them dangerous for travel, while the latter consists of a failure to repair the street or sidewalk after construction, and after becoming unsafe." *Tudor v. Louisville*, 172 Ky. 429, 189 S. W. 456.

In fact undisputed, question of city's negligence is for the court. *Keen v. Mitchell*, 37 S. D. 247, 157 N. W. 1049.

Whether city exercised reasonable care to keep a sidewalk and curbing where the injury occurred in reasonably safe condition in fulfillment of its legal obligation is frequently a question of fact for the jury. *Dayton v. Lowndes*, 174 Ky. 707, 192 S. W. 820.

Charter provided that it must be made to appear that the damage alleged is attributable to the

unless such negligence is established by competent evidence of probative force, liability must be denied.⁶¹

There is no fixed standard of the requirement of reasonable or ordinary care. Its measure is not accurately defined by statute. Manifestly the requirements are not, and cannot be the same under all circumstances, and in all places. In its very nature it is incapable of exact ex-

negligence of the city, as a condition to recovery. *Stallings v. Tampa* (Fla. 1920), 83 So. 625.

The right of action for injury resulting from a defect in a street, causeway, bridge or public way, under the South Carolina statute is based upon the negligence or mismanagement on the part of the city which was the proximate cause of the injury. *Aughtry v. Columbia* (S. C. 1919), 98 S. E. 195.

⁶¹ One who seeks to recover for an injury due to a defective sidewalk has the burden of establishing negligence on the part of the municipality. *Meridian v. Crook*, 109 Miss. 700, 69 So. 132.

Injury resulting from an alleged defect in a street, as a depression, which is not of itself of such dimensions or character as to make an accident probable, the city's negligence should not be submitted to the jury. *Keen v. Mitchell*, 37 S. D. 247, 157 N. W. 1049.

As a city has a right to repair its streets it is not liable for consequential damages resulting from the exercise of this right when performed with ordinary skill and prudence. "The exercise of this right in itself and the conditions that reasonably and necessarily result from the exercise of this right does not constitute negligence.

How it could make repairs of this character, without tearing up some portion of the street, is not conceivable. The evidence tended to show that in making repairs some of the bricks became or were loosened. If this was a necessary incident to the right of the city to make repairs there could be no liability. To create a liability it must appear, further, that there was negligence in the doing of the authorized act, and that this negligence was the proximate cause of the injury. Or, in other words, where the party is engaged in the doing of a legal act, or that which the law commands or permits, the creation of conditions which are reasonably incident to the exercise of this right and accomplishment of the purpose authorized in the power granted, or the duty imposed, does not constitute negligence, and so, unless under instructions properly given, the jury find negligence independent of or in the manner of the exercise of the right, there is no liability." *O'Connell v. Davenport*, 164 Ia. 95, 145 N. W. 519.

While negligence is never presumed, it may nevertheless be proved, like any other fact by circumstantial evidence. *Lichtenberg v. Seattle*, 94 Wash. 391, 162 Pac. 534.

pression, or reduction to an unvarying formula.⁶² What is such care, therefore, in a given case is necessarily dependent on the particular facts developed in the judicial investigation.⁶³ A municipality is required to use greater diligence in looking after the safety of its streets which are much traveled than those where the travel is light.⁶⁴

While the duty of the municipality does not require it to guard against possible dangers of injuries, or everything which may happen, it does require it to exercise reasonable care to guard against such dangers as may reasonably be anticipated.⁶⁵ Anything that may reason-

⁶² *Louisville v. Haugh*, 157 Ky. 643, 163 S. W. 1101.

⁶³ "What would amount to negligence in maintaining a much traveled street in a populous city might constitute ordinary care in a country district; in other words, the question of negligence depends upon the attendant facts and circumstances." *Burke v. District of Columbia*, 42 App. D. C. 438, 441.

Diligence required as to repairing streets in particular case. *Colby v. Portland*, 85 Or. 359, 166 Pac. 537.

When a temporary walk is provided for the use of the public while the regular walk was obstructed, the city must use ordinary care to see that such walk is safe for the purpose intended. *Brentlinger v. Louisville Ry. Co.*, 156 Ky. 685, 161 S. W. 1107.

⁶⁴ *Willis v. St. Joseph*, 184 Mo. App. 428, 171 S. W. 27, following *McKissick v. St. Louis*, 154 Mo. 588, 595, 55 S. W. 859; and *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709.

Streets and walks in outlying districts. Section 2737, post; § 2737, vol. 6, ante.

Size of the municipality and

amount of travel on the street involved are elements to be considered. *Higginbottom v. Burnsville*, 113 Miss. 219, 74 So. 133.

⁶⁵ *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N. E. 387.

A municipality is not bound to provide against the possibility of an accident; nor would a mere error in judgment in laying out a way or adopting a plan be negligence. *Levine v. Pittsburgh*, 252 Pa. 181, 97 Atl. 392.

"The law does not require the city to maintain its streets and walks in a state of absolute perfection or to keep them free from minute and trifling variations in their evenness of surface such as do not in ordinary use render them unsafe for travel by persons exercising reasonable care. Stated in other words, if the defect be so slight that injury therefrom to travelers exercising proper care is not reasonably to be anticipated, then there is no actionable negligence." *Geer v. Des Moines*, 183 Ia. 837, 167 N. W. 635.

A horse stepped on one end of a stick, sharp at one end which caused the stick to press against the horse, penetrate his body and

ably be expected to interfere with the safe use of a public way by travelers making the proper use thereof and exercising ordinary care for their own safety, is a defect, and judicial decisions customarily speak of obstructions of the several kinds as defects.⁶⁶ Thus where a city permits building material to block travel on a sidewalk and a portion of a driveway, it must anticipate that pedestrians would use the driveway and govern itself accordingly.⁶⁷ So where a street was rendered extraordinarily slippery by oiling, and a rain occurred thereafter tending to render the street more dangerous, or if the rain intervening between the oiling and the accident (an automobile carefully driven, skidding, getting beyond control and colliding with a milk wagon) was the factor which created the danger, "then it might have been found that the rain should have been anticipated or its effect guarded against by warning, sanding or otherwise."⁶⁸

cause his death. The evidence showed that at times when the street was muddy, planks and sticks would be thrown in and across the same and that much rubbish, trash and many planks and sticks were in the roadway of the street and had been for some time and that the city had not removed or cleared away such obstructions. It was also shown that the four foot stick that did the damage had been in the street where the injury occurred for about three weeks before it happened.

"The plaintiff must show that an ordinarily prudent and careful person would have realized that this stick left in the street was a dangerous obstruction or missile. It is not enough to show that an accident did happen, and that such an accident was in the realm of possibility, but that a danger existed within the realm of prob-

ability." "The mere fact that sticks and rubbish are in a street where they should not be is insufficient to fasten negligence on the city. They must not only be there, but their very presence must carry the idea of danger to the extent of awakening such idea in the mind of a reasonably careful person." *Starkey v. Greenville*, 189 Mo. App. 352, 175 S. W. 314.

Need not anticipate crowds of people viewing a parade would violently surge against ropes, etc., stretched along the line of sidewalks for the temporary purpose. *Meehan v. Union El. Light & P. Co.*, 252 Mo. 609, 623.

⁶⁶ *Bessemer v. Whaley*, 187 Ala. 525, 65 So. 542.

⁶⁷ *Superior v. Olt*, 239 Fed. 100, 102, 152 C. C. A. 150.

⁶⁸ *Kelleher v. Newburyport*, 227 Mass. 462, 116 N. E. 806, 808.

When a street is opened it is the duty of the municipality to see that it is kept clear of dangerous and unnecessary obstructions which with reasonable care can be discovered and avoided.⁶⁹ And this obligation sometimes involves the anticipation of defects or dangers that are the natural or ordinary result of use or climatic influence, and a failure of the municipality to make sufficiently frequent examinations may render it liable, although the defect or danger may not be open and notorious.⁷⁰

Moreover, to create liability not only must it be established that the municipality was negligent, but that the injuries complained of are the result of such negligence. The complaining party has no cause of action unless the city's act produced the injury complained of.⁷¹ "When negligence is averred as the cause of injuries sustained,

69 "Failure to abate dangers which reasonable care would have revealed will charge the city with liability, and this whether the form of action be negligence or nuisance." *Stern v. International Ry. Co.*, 220 N. Y. 284, 115 N. E. 759, 762, affirming 153 N. Y. S. 520, 167 App. Div. 503.

70 Rusty and unused wire crossing a street over live trolley wires, which had not been examined by the city for six years, during a wind, broke and fell across the trolley wire and against the mule of plaintiff. Under the evidence the court said it was for the jury to say whether or not the town knew or should have known of the dangerous condition of the wire. *Chicago & West S. Exp. Co. v. Berwyn*, 174 Ill. App. 543, 546.

Duty of city to look after and inspect bridges and coverings of wood which are subject to rapid deterioration, and failure to do so may be negligence. *Smith v. New*

Orleans, 135 La. 980, 66 So. 319.

71 The burden was upon the plaintiff to produce evidence which would justify a finding that the negligence of the municipality was the sole producing and proximate cause of the injury. *Glancy v. McKees Rocks Borough*, 243 Pa. 216, 89 Atl. 972.

Plaintiff's complaint was that her foot had slipped into a hole or depression shown to have existed in the pavement over which she was walking. In sustaining a judgment of nonsuit the court said: "The difficulty with plaintiff's case is that she failed to sustain by proof the averment that she was thrown by reason of her foot slipping into the hole. The party who claims damages by reason of the negligent act of another must show, not only that the other party was negligent but that his injuries are the result of such negligence. The complaining party has no cause of action unless the wrongdoer's act produces the in-

it is not sufficient that the injured plaintiff merely established the negligence alleged; he must show that it was the cause of his injuries." ⁷² Furthermore, under a statute imposing liability on a municipality for personal injuries sustained by reason of defects in a street in an action, where such injury might have been prevented by the city or the defect repaired by the exercise of reasonable care, the burden rests upon the plaintiff to establish, as a condition precedent to recovery, that the defect which caused the injury was one of which the city had knowledge, or by the exercise of reasonable care and diligence might have had knowledge in time to have remedied it or to have prevented the injury. ⁷³

§ 2727. Prior accident at same place as sufficient to show negligence. ⁷⁴

It is competent to show that while the street at the point involved was in the same condition, accidents of a similar nature to the one under investigation had occurred at the same place a short time prior thereto. ⁷⁵

jury complained of." *Reddington v. Philadelphia*, 253 Pa. 390, 98 Atl. 601, per *Mestrezat*, J.

⁷² *Stern v. Reading*, 255 Pa. 96, 99 Atl. 367, approving *Reddington v. Philadelphia*, 253 Pa. 390, 98 Atl. 601.

Automobile ran into a hole in the street. The plaintiff was a passenger therein. At the trial the burden was on plaintiff to show that the street in question has been negligently maintained; that the city either had constructive or actual notice of the defective condition in time to make repairs; and that the defective condition of the street was the proximate cause of the injury. *McDonald v. Philadelphia*, 248 Pa. 145, 93 Atl. 959.

⁷³ *Hamilton v. Cambridge*, 219 Mass. 418, 106 N. E. 1018.

⁷⁴ *Wagner v. Kansas City* (Mo. App.), 186 S. W. 1129, following *Charlton v. St. Louis & S. F. Ry. Co.*, 200 Mo. 413, 442, 98 S. W. 529; *Kansier v. Billings* (Mont.), 184 Pac. 630; *Shugren v. Salt Lake City* (Utah), 159 Pac. 530.

Evidence relating to the condition of other sidewalks in the city is inadmissible in an action for injuries due to an alleged defective walk. *Hanson v. Anamosa*, 177 Ia. 101, 158 N. W. 591, 595.

Evidence that no other persons were injured at the place involved is inadmissible. *Clancy v. Joplin* (Mo. App.), 181 S. W. 120, 123.

⁷⁵ "That accidents have heretofore happened under the same con-

Thus in an action for injury to a pedestrian due to stepping on the lid of a coal hole in a sidewalk which tilted, testimony is admissible of other pedestrians who stepped on the same lid with like effect and barely escaped injury.⁷⁶ So in such case, evidence is admissible tending to prove that the coal hole cover, prior to the injury involved, frequently had been observed to slip and tilt when passers-by stepped upon it. Such evidence while it shows no previous injuries to any one, does tend to show that the effect of stepping on the coal hole cover was to cause it to slip and tilt, and consequently, to show the existence of a dangerous condition.⁷⁷ But evidence of prior accidents at the same place must, of course, relate to the exact place.⁷⁸ Hence, testimony to the effect that a witness "made a slip there" is not competent unless it appears that he made the slip at the precise place in question.⁷⁹ So in an action due to injury from falling over a wire, evidence that on a number of occasions other persons had fallen over the same wire is inadmissible, where it does not relate to the particular location in ques-

ditions at a given spot from the same cause seems competent proof." *Charlton v. St. Louis & S. F. Ry. Co.*, 200 Mo. 413, 442, 98 S. W. 529, approving *District of Columbia v. Armes*, 107 U. S. 519, and *Golden v. Clinton*, 54 Mo. App. 100.

Evidence is admissible to prove that other people fell at the place in question at about the time involved. "Such evidence of course, is not admissible unless shown to be nearly corresponding, both as to time and place, with the injury or fall in question, so as to tend to show that the condition was the same." *Perrine v. Southern Bitulithic Co.*, 190 Ala. 96, 66 So. 705.

Evidence that others had driven over the point where the accident

occurred and had experienced accidents at that place is admissible. All of such testimony relates to events closely associated, prior in time, with the accident complained of, and at the point where it occurred. *Chickasha v. White*, 45 Okl. 631, 146 Pac. 578.

⁷⁶ *Posey v. National Bank*, 243 Pa. 563, 90 Atl. 363.

⁷⁷ *Hebenheimer v. St. Louis*, 269 Mo. 92, 102, 103, 189 S. W. 1180, approving *Charlton v. St. Louis & S. F. Ry. Co.*, 200 Mo. 413, 442, 98 S. W. 529; *Golden v. Clinton*, 54 Mo. App. 100, and overruling on this point *Globe v. Kansas City*, 148 Mo. 470.

⁷⁸ *Tudor v. Louisville*, 172 Ky. 429, 189 S. W. 456.

⁷⁹ *Lawrence v. Frankfort*, 162 Ky. 528, 172 S. W. 953.

tion.⁸⁰ It is error, therefore, to allow evidence to show the bad condition of the street or sidewalk in parts other than the place of the accident. Such evidence has no probative value to establish negligence on the part of the city and its reception is usually held to be prejudicial error sufficiently serious to require the reversal of a judgment, in event of a judgment in favor of the plaintiff.⁸¹ Evidence that persons had fallen over the obstruction involved after the injury complained of is not competent for the purpose of charging the city with negligence, nor is it competent for the purpose of charging the city with notice of the alleged defect.⁸²

§ 2728. Duty cannot be delegated so as to shift responsibility.⁸³

⁸⁰ *Birmingham v. McKinnon* (Ala.), 75 So. 487.

⁸¹ *Fithin v. Degnon Contracting Co.*, 161 N. Y. S. 888, 175 App. Div. 386.

⁸² "The defect must exist and notice of the defect must be brought home to the city before the accident if the defect is one for which the city is not liable without notice. If a city is not liable without notice, then surely it follows that notice after the injury would not be such notice as would enable it to repair before the accident and avoid the injury. If the falls over this walk were introduced for the purpose of showing notice to the city, or for the purpose of showing negligence on the part of the city, then clearly the evidence was not competent, for the reason that these falls were all subsequent to the injury." Relating to the admission of such evidence in a particular case it was said that

it did not impinge upon the rule stated. "This was not offered as substantive testimony tending to show any negligence on the part of the defendant prior to the injury, nor of notice to the defendant of the existence of the trough (obstruction). It simply came incidentally as tending to show the reason why these witnesses remembered the existence of the trough at this location prior to the injury; why it was impressed upon their minds." *Hall v. Shenandoah*, 179 Ia. 1192, 162 N. W. 575.

⁸³ *Indiana. Indianapolis v. Stokes*, 182 Ind. 31, 105 N. E. 477.

Kentucky. Louisville v. Batt's Administrator, 151 Ky. 578, 152 S. W. 529.

Missouri. Schlinski v. St. Joseph, 170 Mo. App. 380, 387, 156 S. W. 823; *Stifel v. St. Louis* (Mo.), 181 S. W. 577, 581, 582.

Nebraska. Cushman Motor Works v. Lincoln, 97 Neb. 519, 150 N. W. 821.

§ 2729. Necessity of lapse of time between notice of defect and time of accident.⁸⁴

§ 2730. Miscellaneous matters held not defense.

Failure to pay a license fee to operate a motorcycle, it has been held, does not bar recovery unless such failure

New York. *Hayman v. New York*, 148 N. Y. S. 63, 163 App. Div. 195.

Oklahoma. *Fairfax v. Giraud*, 25 Okl. 659, 131 Pac. 159.

Oregon. *Caviness v. Vale*, 86 Or. 554, 169 Pac. 95, 98.

Defect in walk due to act of abutting owner where city was held liable. *Briscoe v. Mt. Vernon*, 160 N. Y. S. 924, 174 App. Div. 200.

Plaintiff drove his buggy over a pile of rock in the street and was injured. The rock had been placed in the street by a property owner who was making an improvement on his lot. "It may be that the property owner was negligent in putting the rock in the street as he did and failing to put a light upon it to warn persons of the danger at night; but his negligence does not exonerate the city from liability. The primary duty rests upon the city to maintain its streets in a reasonably safe condition. When it knew the rock was in the street it was incumbent on it to see that it was properly guarded and it is liable to a person injured by reason of the street being in a dangerous condition. It is no defense to the city that it did not know that the property owner had failed to put lights on the rock. When it knew that the rock was in the street and that

it made the street unsafe for public travel when without lights at night, it was its duty to see that its street was kept safe." *Carlisle v. Campbell*, 151 Ky. 279, 151 S. W. 673.

A sidewalk was left in a defective condition by a contractor who worked on a building abutting thereon, and the municipal corporation omitted to remove the defect, held liability existed for injury. *Benoud v. Sayre*, 56 Pa. Super. Ct. 215.

Injury on defective sidewalk due to negligence of contractor engaged in installing a system of municipal waterworks. *Hugo v. Nance*, 29 Okl. 640, 135 Pac. 346, 349, following doctrine of *Beatrice v. Reid*, 41 Neb. 224, 59 N. W. 774; *Beattie v. Detroit*, 129 Mich. 25, 88 N. W. 71.

"When changes are being made in a public street of a city by somebody independent of the city and acting under direction of legislative authority providing for the abolition of grade crossings or for some other public work, such city is not relieved from its statutory liability for injury to a traveler caused by a defect in the street, if the city has not actually closed said street to public travel." *Gilbane v. Lent*, 41 R. I. 462, 104 Atl. 77, 81.

⁸⁴ *Pickens v. Kankakee*, 200 Ill.

sustains some causal relation to the injury.⁸⁵ Omission to register a second hand automobile as required by the statute was held no defense to an action for personal injuries due to a defective street.⁸⁶ However, in Maine and Massachusetts, it appears that in both of these cases, a contrary ruling would likely be made.⁸⁷ Neglect of one injured by an obstruction on the sidewalk to keep to the right is no defense, notwithstanding it violates an ordinance on the subject.⁸⁸ Violation of an ordinance as to the way to turn is no defense where the street was unsafe and compelled the selection of the safest way, and where to observe the ordinance would have been dangerous.⁸⁹ A municipality cannot plead and show the refusal of a contractor to enter into a contract to repair the street in an action for injury to a passenger alighting from a street car by stepping into a hole in the street.⁹⁰

A municipality is not liable to answer in damages to one who is injured while coasting on a street contrary to an ordinance, although tolerated by its police officers.⁹¹

App. 547; *Indianapolis v. Stokes*, 182 Ind. 31, 105 N. E. 477; *Drimmel v. Kansas City*, 180 Mo. App. 339, 168 S. W. 280.

⁸⁵ *Phipps v. Perry*, 178 Ia. 173, 159 N. W. 653.

⁸⁶ "It is clear that plaintiff's failure to register the car had nothing whatever to do with the accident; that there is no showing of any causal connection between plaintiff's violation of the law and the accident, hence his violation of the law was no defense to the action. No authority need be cited in support of this proposition; but we may properly refer in this connection to *Lockhart v. Railroad*, 161 Iowa 74, 140 N. W. 834, Ann. Cas. 1916A, 158. The law, as originally announced in Massachusetts and perhaps in some other states has never been recognized in this

jurisdiction. *Wolford v. Grinnell*, 178 Iowa 689, 161 N. W. 686, 688.

⁸⁷ Section 2758, vol. 6, ante; § 2754, post.

⁸⁸ "The ordinance was manifestly made to prevent collisions betwixt persons moving on the same pavement in opposite directions. There was no collision in the instant case." *Lancaster v. Columbia*, 104 S. C. 228, 88 S. E. 463.

⁸⁹ *Kempa v. St. Joseph*, 178 Mo. App. 292, 165 S. W. 1176.

⁹⁰ *Covington v. Westbay*, 156 Ky. 839, 162 S. W. 91.

⁹¹ "The mere non-enforcement of an ordinance by the administrative officers of a city will not overcome it or estop the municipality from claiming its benefit when sued by one whose injury is traceable to its non-observance."

§ 2732. Same—lack of funds to repair.⁹²

Evidence concerning the extent of the financial ability of the municipal corporation to meet all its obligations as a local governmental organ for the purpose of showing ordinary care, is usually held inadmissible. This conclusion results from the fact that in the absence of legislative restrictions, it is the absolute duty of the municipality to exercise ordinary care to keep its streets and public ways in a reasonably safe condition for travel by night and day in the usual manner, except for repairing defects or for removing necessary temporary obstructions or those caused by the act of God.⁹³

Certain statutes as construed, permit the admission of evidence of lack of funds to repair. Thus in Massachusetts in an action against a town for personal injuries caused by an alleged defect in a public way, evidence of the population of the town, the assessed valuation of the property therein, the rate of taxation, and the amount of the appropriation for highways, all in the year preceding that of the accident, and the number of miles of public ways therein, is competent on the question of reason-

* * * That the failure to execute an ordinance on the part of administrative officers will not make the city liable or permit one who has violated the ordinance to take advantage of what may well be called his own wrong rests in even a deeper principal. The act of a city council in passing an ordinance is an expression of the corporate power of the city. That duty, so far as the concern of the public goes, is fully performed when the ordinance is passed, and to permit administrative officers whose duty rests in the police power rather than in the legislative power of the city, to nullify an ordinance by ignoring it or failing wilfully to enforce it, would

be to deny to the city council the power to legislate. Such a holding would put the power to veto an ordinance, which from the very nature of things must be accepted as the true expression of the will of the public in the hands of an agency having no legislative power or responsibility." *Fluckiger v. Seattle*, 103 Wash. 330, 174 Pac. 456, approving *Kitsap County Transp. Co. v. Seattle*, 75 Wash. 673, 135 Pac. 476, Ann. Cas. 1915C, 115.

⁹² *Henderson v. Field* (Tex. Civ. App.), 194 S. W. 1003.

⁹³ *Ledbetter v. Kirksville*, 167 Mo. App. 195, 200, 201, 151 S. W. 228.

able care and diligence, on the part of the town in preventing or remedying the alleged defect; its weight is for the jury in connection with all other circumstances.⁹⁴

II. PARTICULAR STREETS AS TO WHICH LIABILITY EXTENDS.

§ 2733. Streets must be public highways.⁹⁵

A highway existing prior to the incorporation of the

⁹⁴ Weeks v. Needham, 156 Mass. 289. See Sanders v. Palmer, 154 Mass. 475; 128 Mass. 580. The reason given for the ruling is peculiar to that State. A statute provided "that towns shall be liable for personal injury or damage to property caused by defects in a highway 'which might have been remedied, or which damage or injury might have been prevented by reasonable care and diligence on the part of the county, or town, place or persons obliged by law to repair the same.'" The court held that the statute, "is a limitation on the former liability of towns, and it is now necessary, not only that the defect should have existed which was the sole cause of plaintiff's injury, but that such defect be one which might have been remedied by reasonable care and diligence on the part of the town," and that: "It is the intention of the statute to protect towns from liability where there has been no lack of proper diligence on their part, and in determining that, it is important to know what was done, as well as the cost of what it is contended should have been done to keep the way in a suitable state of repair." Rooney v. Randolph, 128 Mass. 580.

⁹⁵ Gage v. Vienna, 196 Ill. App. 585; Louisville v. Monroe, 163 Ky. 412, 173 S. W. 1107; Abbey v. Wathins, 161 N. Y. S. 688, 175 App. Div. 660; Cunius v. Edwardsville Borough, 63 Pa. Super. Ct. 118; Klein v. Philadelphia, 62 Pa. Super. Ct. 121; Richardson v. Seattle, 97 Wash. 521, 166 Pac. 1131.

Allegation that street was a public thoroughfare within the municipal area is essential. Bickel Asphalt Paving Co. v. Yeager, 176 Ky. 712, 197 S. W. 417.

Whether the particular street is or is not a public highway rendering the city liable is sometimes a question of fact for the jury. Kniss v. Duquesne, 255 Pa. 417, 100 Atl. 132; Virginia Beach v. Ogle, 120 Va. 611, 91 S. E. 747.

As soon as devotion of street to public use, liability exists. McMillian v. Clinton (Mo. App. 1919), 210 S. W. 918.

If street opened for travel, although no sidewalk has been built, liability may arise. McMillian v. Clinton (Mo. App. 1919), 210 S. W. 918.

Whether highway had become such by prescription, held jury question. Sullivan v. Worcester, 232 Mass. 111, 121 N. E. 788.

Alley. Child fell into open ditch

city becomes a highway of the city on incorporation.⁹⁶ A municipality in merely accepting a street, or by declaring that it is such, or in deciding to what extent the street shall be given to the public for use, acts in its governmental or legislative capacity, and cannot be held liable for any neglect of duty until after it has acted in its ministerial capacity by giving the street to the public for use and inviting the public to travel the same; and since it is a governmental matter for the municipality to say to what extent it will offer a street to the public for use, if an individual attempts to use a portion which the municipality has neither actually nor impliedly invited him to use, and is injured thereon, he is without remedy against the municipality.⁹⁷ "While the mere act of the dedication of a street and approval thereof by a municipality does not without more impose upon it the duty as to maintenance and repair which are cast upon a city by law whenever it appropriates a street to the use of the public,⁹⁸ yet these obligations do arise the instance a city, with or without such formalities, devotes a highway to the uses of the public by recognizing it as open for travel, or invites the public to use it as a street. And such acts on its part may be shown either by direct or circumstantial evidence."⁹⁹ While the platting and

in an alley, not designed for general travel, and held it was not governed by rules relating to such highways. City is not held to same measure of responsibility for the condition of the alley as a way as it is in case of a public street. The alley was not in actual use as a way of travel. No liability. *Athey v. Tennessee Coal, Iron & R. Co.*, 191 Ala. 646, 68 So. 154.

⁹⁶ *Oakdale v. Sanders*, 155 Ky. 352, 159 S. W. 812.

⁹⁷ *Jackson v. Sedalia*, 193 Mo. App. 597, 187 S. W. 127, 129.

⁹⁸ *Drimmel v. Kansas City*, 180

Mo. App. 339, 351, 168 S. W. 280.

⁹⁹ *Curran v. St. Joseph*, 264 Mo. 656, 175 S. W. 584; *Stretch v. Lancaster* (Mo. App.), 206 S. W. 388; *Proctor v. Poplar Bluff* (Mo. App.), 184 S. W. 123, 126.

"In addition to a long, continuous and notorious usage of the streets by the public as highways, manifestly known to and approved by the city government, the public sewer and lighting system had been extended by the city over them. Such acts unquestionably constitute an acceptance of the streets, and an invitation to the public to use them as public thor-

dedication of a street, followed by public use of such platted street as a thoroughfare, will not alone give it the character of a street, nor cast upon the city the duty to keep it in repair,¹ the grading of such dedicated and public used street by the municipality will constitute an assumption of control and an invitation to the public to use the street as one which the municipality is duly bound to exercise ordinary care to keep in a reasonably safe condition for travel.²

Acceptance of a dedicated street and assumption of control thereover by the municipality is usually required,³ but such acceptance and assumption of control may be implied by public user,⁴ as well as by corporate action.⁵

oughfares which the city had undertaken to maintain in a reasonably safe condition for travel." *Twedell v. St. Joseph*, 167 Mo. App. 547, 152 S. W. 432.

Where a continuous use of the way is shown and from the evidence it appears that the city had kept the street in repair and thereby invited the public to use it, such invitation and its acceptance by the public implied an assumption by the city of the burden of maintaining the street in a reasonably safe condition. *Kempa v. St. Joseph*, 178 Mo. App. 292, 165 S. W. 1176.

"To establish the charter of the locality where the injury occurred as a part of a public street, nothing more was essential than to show that it was in actual possession of the city and open to and used by the public as a thoroughfare at the time. * * * It was not necessary to prove any formal dedication or appropriation of the street." *Maus v. Spring-*

field, 101 Mo. 613, 617, 14 S. W. 630, 20 Am. St. Rep. 634.

"The street was open to public use and the city was bound to keep it in a condition of reasonable safety for legitimate travel by night as well as by day." *Haniford v. Kansas City*, 103 Mo. 172, 181, 15 S. W. 753.

¹ *Curran v. St. Joseph*, 264 Mo. 656, 175 S. W. 584.

² *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168; *Chance v. St. Joseph*, 195 Mo. App. 1, 5, 190 S. W. 24; *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612.

³ *Ivey v. Birmingham*, 190 Ala. 196, 67 So. 506; *Raines v. East Tennessee Telephone Co.*, 150 Ky. 670, 150 S. W. 830; *Grant v. Dickson City Borough*, 235 Pa. 536, 84 Atl. 454; *Morgan v. Budlong*, 162 Wis. 578, 156 N. W. 958.

⁴ *Doyle v. Chattanooga*, 128 Tenn. 433, 161 S. W. 997.

⁵ *Caston v. Rockhill*, 107 S. C. 124, 92 S. E. 191.

The acceptance of a dedication of a street by the city and grad-

A municipality is not liable where it had no control over the street or walk on which the injury happened.⁶

User by the public of streets and ways and recognition of such user by the municipality, may constitute such streets and ways public as to municipal liability.⁷ Thus

ing it undoubtedly is an invitation to the public to use it as such, and where a sidewalk is placed thereon, and it does not appear by whom, the obligation is imposed on the city to maintain it in proper condition for travel. *Drimmel v. Kansas City*, 180 Mo. App. 339, 168 S. W. 280.

⁶*Holt v. Buffalo*, 160 N. Y. S. 750.

Evidence showed street was under control of city. *Ludlow v. Stetson*, 163 Ky. 327, 173 S. W. 806.

"The variation in the pavement, or the fact that the so-called marginal street is cleaned by employees of the dock department in no way limited the public character of this space." *Swindell v. New York & Cuba S. Co.*, 163 N. Y. S. 48, 98 Misc. Rep. 350.

⁷Where it appears that the street was open to the public and used for travel by the public generally, this is sufficient as to the persons using the street, but as to the public authorities it may not have been such. *Colebank v. Standard Garage Company*, 75 W. Va. 389, 84 S. E. 1051.

Use of a strip as an alley for period of twenty years after dedication and acceptance, held public highway. *O'Brien v. Heman*, 191 Mo. App. 477, 175 S. W. 805.

"The inhabitants of a locality having by long continued use treated the way as a public one,

they make it such without the intervention of those who derive their authority from them; and they may themselves exercise the power of government of highways quite as effectually by continued use as by any other method." This extract is said by Judge Lamm, in *Benton v. St. Louis*, 217 Mo. 687, 705, to be a correct statement of the law. (*Curran v. St. Joseph*, 143 Mo. App. 618.)" *Asbury v. Kansas City*, 161 Mo. App. 496, 499, 144 S. W. 127.

"In the case at bar the defendant and city had for years maintained this culvert with knowledge of its use by the public as a foot bridge, and it ought to be required to respond for the consequences of its negligence in maintaining it." *Browning v. Aurora*, 190 Mo. App. 477, 177 S. W. 685.

"When the lot holder where the gate was set his fence back six feet, as he did, and thereby dedicated that space for a sidewalk for the public, and when the public so used it as it did, then the law cast upon the corporation the duty to keep it in reasonable safe condition for use." The action was for injury due to falling over a gate on the pavement. *Caston v. Rockhill*, 107 S. C. 124, 92 S. E. 191.

Injury was due to falling through trestle work or a wharf at a place claimed to be a public street. There was no evidence that

a municipality, it was held, was liable for injuries resulting from defective sidewalks constructed on private property where they were treated by the city as public walks and permitted to be used as such.⁸ But a municipality, it was also held, was not liable for injuries due to defective steps in the side of a steep hill wholly on private property, although used by the public, where such steps had not been built by it, although its street committee made some slight repairs on such steps, but such repairs were not authorized by its legislative body, nor no report of such repairs was made by such committee, nor was any account of expenditures for such repairs ever rendered to the municipality.⁹

§ 2734. Same—streets outside municipal limits.¹⁰

the city built the wharf or approach thereto or as to who built it. Neither was there any evidence that the city had ever expended any money on its repair or maintenance. "But it is not necessary that the city should have opened the street, or built or repaired the wharf, in order to constitute the same a public street. A place may become a street or highway by twenty years' use only." This is the law in Wisconsin. "Neither does a highway or street need to take any specific form or structure, such as earth, earth embankment, bridge or trestle. If its form and structure is such that it serves the purpose of a street or highway and is used as such, it is immaterial what its form may be or that it may also serve another purpose. Here the fill and wharf served to connect the travel of the city streets with travel on the Fox River. Both streets and river were public highways—the former

by the acts of the city or its people; the latter by the provisions of the ordinance of 1787 and the constitution of the state. This travel was within the lines of Cedar Street extended to the established dock line, and was shown to have been more or less continuous for over twenty-five years." *Nuthals v. Green Bay*, 162 Wis. 434, 156 N. W. 472.

⁸ *Richmond v. Marseilles*, 190 Ill. App. 227, 230.

⁹ *Wahl v. McKees Rocks Borough*, 64 Pa. Super. Ct. 155.

¹⁰ No municipal liability. *Thomasville v. Crowell*, 22 Ga. App. 383, 96 S. E. 335; *Ryder v. La Grande*, 73 Or. 227, 144 Pac. 471, quoting with approval part of § 2634, vol. 6, ante.

Particular statute held not to impose obligation on municipality to keep in repair public ways beyond its area. *Peterson v. Jordan*, 135 Minn. 384, 160 N. W. 1026, 1028.

§ 2735. Streets not opened or improved.¹¹

It is the improvement of the street that fixes liability for neglect of duty; the invitation on the part of the city to use that portion of the street on which the traveler is injured that renders the city liable for neglecting to keep such portion in a reasonably safe condition for travel.¹² Thus a public street which had been accepted, and opened

¹¹ *Hageage v. District of Columbia*, 42 App. D. C. 109, 112.

Duty begins only as to streets undertaken to be improved. *Dudley v. Smithland*, 174 Ky. 248, 192 S. W. 21, 23.

Injury due to a defective private plank walk, but without consent or notice to the city on an unimproved street creates no municipal liability. *La Breck v. Hoquiam*, 95 Wash. 463, 164 Pac. 67, 69.

¹² "Of course, the fact that the city has improved, or has sought to repair, the portion of the street where the injury occurred, is evidence that such portion has been given and opened to the public for use; but if that can be shown by other facts, it will be sufficient." *Jackson v. Sedalia*, 193 Mo. App. 597, 187 S. W. 127, 129.

Closing a street and diverting travel over an improved street is an invitation to the public to use such street, and the city cannot evade liability by claiming it never improved such street for traffic. *Reynolds v. St. Joseph* (Mo. App.), 193 S. W. 888.

"While the platting and dedication of a street, followed by public use of such platted street as a thoroughfare, will not alone give it the character of a street, nor cast upon the city the duty to

keep it in repair, * * * the grading of such dedicated and publicly used street by the city will constitute an assumption of control and an invitation to the public to use the street as one which the city is duly bound to keep in a reasonably safe condition for travel." *Chance v. St. Joseph*, 195 Mo. App. 1, 190 S. W. 24, per Johnson, J.

"It is not the duty of a municipality to keep streets and alleys open in repair, and free from nuisance until it opens the same to public travel or in some other manner invites the public to use the same for street and alley purposes, notwithstanding such streets and alleys had been dedicated by a private owner to such public purpose, and such dedication has been accepted by the council of a municipality. The question whether streets and alleys dedicated to public use and accepted by the public have been improved or opened up to the public travel, or the public invited in any other way to make use of the same for such purpose, is one for the jury, and where there is any evidence tending to prove such facts, it is error for the trial court to direct a verdict." *Dayton v. Rhotehamel*, 90 Ohio St. 175, 106 N. E. 967.

to public travel charges the city with the duty of exercising reasonable care to maintain the sidewalk thereon in a reasonably safe condition for public use.¹³ But there must be some expression by the city, either by formal pronouncement or by conduct of a purpose to assume control over the street and open it to public use, to make the city responsible for its condition.¹⁴

"A city is not required to open or put all of its streets in a condition for public travel, and the customary liability does not attach as to a paper street which has been neither accepted, opened or improved."¹⁵ "A city is not required to grade or improve or keep in condition platted or dedicated streets within its limits which have never been traveled. If, however, an ungraded street is frequented by travel, and the city has notice of the fact, it must keep such street in reasonably safe condition for travel."¹⁶ If a street had been traveled for some years, and such travel was considerable and notorious, the city was chargeable with such knowledge, and thus the obligation to keep such street in safe condition was created.¹⁷

§ 2736. What included within term "street."¹⁸

An alley connecting two of the streets of a municipality was held a public alley.¹⁹ The South Carolina statute makes a city liable for injuries due to the negligence of

¹³ *Studer v. St. Joseph* (Mo. App.), 185 S. W. 1196.

¹⁴ *Babbitt v. St. Joseph* (Mo. App.), 186 S. W. 113.

¹⁵ *Roanoke v. Sartina* (Va.), 96 S. E. 763, quoting with approval the entire section, § 2735, vol. 6, ante.

"It is not the duty of cities to improve all streets which are platted within the boundaries thereof. It is the duty of cities to improve only streets which are necessary, and to the extent necessary. The city, of course, is the judge of such necessity. It would

be impossible for any city, except one which is thickly populated, to improve all its streets within its boundaries." *La Breck v. Hoquiam*, 95 Wash. 463, 164 Pac. 67, 69, per Mount, J.

¹⁶ *Miller v. Duluth*, 134 Minn. 418, 159 N. W. 960.

¹⁷ *Sundell v. Tintah*, 117 Minn. 170, 134 N. W. 639, 38 L. R. A. (N. S.) 1127, Ann. Cas. 1913C, 1311.

¹⁸ *Swenson v. Aurora*, 196 Ill. App. 83, 88, 89.

¹⁹ *Bellevue Gas & Oil Co. v. Carr* (Okl.), 161 Pac. 203.

the city occurring in "any street, causeway, bridge or public way." It extends, it was held, to hurts received from defects in the driveway of a street and also to hurts received from defects in the sidewalk of a street. "A street is but an urban way; and the limits of such a way as this, from side to side, are those fixed by public user. The public may reserve and use part of the way for foot passengers and a part of the way for horses and wheels. The pavement or sidewalk is a way."²⁰

§ 2737. Streets and walks in outlying districts.²¹

"The degree (amount) of care which a city is required to exercise to keep its streets and sidewalks in a reasonably safe condition will vary according to the location, character, and extent of the use to which they are put. The city cannot be expected to use the same degree (amount) of care over streets and walks in outlying districts that are but little used as is required in respect to those in the busy centers which are constantly used by a large number of persons. The duty is of the same general character but differs in degree (amount) and must be commensurate with the danger to be apprehended from its neglect."²²

²⁰ *Caston v. Rockhill*, 107 S. C. 124, 92 S. E. 191.

In an action due to injuries on account of a defective street an amendment was permitted changing the word "street" in the declaration to "place," it being merely in that case a different description of the same locality. *Carlin v. Chicago*, 262 Ill. 364, 373, 374, 104 N. E. 905, 909, reversing 177 Ill. App. 89.

²¹ *McKelvey v. Juniata Borough* (Pa. 1919), 108 Atl. 205.

MacDermid v. Seattle, 93 Wash. 167, 160 Pac. 290; *Klein v. Philadelphia*, 62 Pa. Super Ct. 121.

Whether defective street, as a

gully therein, near a bridge in the suburbs of a village, a question of fact. *Higginbottom v. Burnsville*, 113 Miss. 219, 74 So. 133.

"Sidewalks built by the city, or under the direction of the city, must, of course, be kept in reasonable repair, but the city ought not to be held responsible for sidewalks, or walks of any kind, built by private individuals, for private convenience, in remote outlying districts of the city, without notice to the city." *La Breck v. Hoquiam*, 95 Wash. 463, 164 Pac. 67, 69, per Mount, J.

²² "The extent of the duty in

§ 2738. Streets in property annexed.²³**§ 2739. Injury outside of street limits.²⁴****III. PARTICULAR PARTS OF STREETS TO WHICH LIABILITY EXTENDS.****§ 2742. "Width" of way as to which duty extends.**

If the injury occurs on a part of a street the city had not invited pedestrians to use, but which had been left in a state of nature, and which had not been thrown open to the use of the public, frequently municipal liability is denied. In such case it is argued that the city's obligation towards persons using its public streets springs from invitation, express or implied, and unless the city does something or omits to do something, from which such invitation reasonably may be inferred or implied, it can-

any given case, and whether it has been performed, is a question of fact for the determination of the jury. It cannot, therefore, be said that the duty of a city in respect to its streets and sidewalks is the same in one locality as in another, hence a declaration which charges a municipality with a violation of its duty to the public in failing to use reasonable care in respect to a street or a sidewalk in a particular designated place might not be the same duty, in degree (amount) that would be required of the municipality in another locality." *Carlin v. Chicago*, 262 Ill. 564, 573, 104 N. E. 905, 909 (reversing 177 Ill. App. 89, approving *Gillmore v. Chicago*, 224 Ill. 490, 79 N. E. 596), per *Vickers, J.*

"The same degree (amount) of care is not required of the city in maintaining this foot way as would be exacted in the populous

part of the city as to its regularly constructed sidewalks, but such ways, as here involved, must be reasonably safe." *Browning v. Aurora*, 190 Mo. App. 477, 177 S. W. 685.

²³ *Georgia Railway & Electric Co. v. Tompkins*, 138 Ga. 596, 75 S. E. 664.

²⁴ *Stump* in street outside of the regularly traveled way as dangerous obstruction to travel struck by automobile. The street was a side street, little used, and extended to a sparsely populated part of the small town. The stump stood just across the line, marked out for use of pedestrians, the theoretical sidewalk. Inasmuch as the traveled way set apart for vehicles was in fair conditions, without obstructions, the stump was considered not such defect as to create liability. *Wheeler v. Flatonia* (Tex. Civ. App.), 155 S. W. 951.

not be said to have assumed any obligation towards the public with respect to merely platted or dedicated streets or public ways on paper. The city has a right, therefore, to prepare a way of a width which in its discretion will accommodate the public in the middle of a dedicated or platted street, without assuming any duty or liability with respect to the portion of the street allowed to remain in a state of nature.²⁵ "The general rule is that the public ways for their entire length and width should be reasonably safe for uses consistent with the reason for their establishment and existence. But this general rule is subject to the necessary qualifications that the municipal authorities may, in the exercise of a sound and reasonable judgment, fairly and with due regard to the public needs and welfare, apportion the surface of public streets to the uses of vehicles, to the use of pedestrians, and to ornamentation and beneficial uses resulting from parkways."²⁶

²⁵ Robinson v. Kansas City, 179 Mo. App. 210, 214, 166 S. W. 343.

"The city lawfully exercised its governmental discretion to grade and prepare for use only the wagon roadway in part of the street; it was not required to grade and improve the whole eighty foot space and build sidewalks on it, and therefore is not liable for not having done so. The path through the weeds and over the uneven surface spoke for itself and told every one that there was no sidewalk there and it invited no one to use it at the city's expense. The city was not responsible for the condition of that path." Ely v. St. Louis, 181 Mo. 723, 730, 731, 81 S. W. 168.

May improve part of street for pedestrians and part for vehicles, and may allow obstructions in another part. Of course, the parts

opened for travel must be kept reasonably safe for travel in the usual modes by invoking ordinary care. Brennan v. Streater, 256 Ill. 468, 100 N. E. 266, affirming 168 Ill. App. 134.

Part left open and part withdrawn from public use, when undergoing repairs. Schlinski v. St. Joseph, 170 Mo. App. 380, 156 S. W. 823.

²⁶ "This practice is quite general, if not universal, in resident sections of cities, and in such sections of many of the towns in this state. Where the walkway and the vehicle way are adequate to their respective public needs there is no reason why an appropriate city taste may not be expressed by allotting the remaining surface of the streets, between the two ways mentioned, to the commendable ornamentation and public advan-

In opening a street for public travel, therefore, the

tages, that trees, surrounded by grass plots, will afford. * * * Such apportionment is of, and consistent with, the authority and control the municipalities have conferred upon them in respect to their streets. Judgmatically administered the particular power and authority under consideration is not without a practical economic benefit in the way of a sensible avoidance of unnecessary expenditure for paving in our municipalities. Areas so apportioned to trees or grass plots are, of course, still a part of the street; and municipal duty in respect to such areas as parts of streets is not suspended or annulled. Where, however, such apportioning is effected with due regard to making the before-mentioned two ways of travel adequate and reasonably safe for their purposes, the very necessary, though not expressly declared, result is to warn pedestrians and travelers otherwise to take the ways provided for their movement over the streets, and, while not necessarily penalizing entry upon such plots, to stop them from general travel use. If not so, it is evident that the power and authority thus properly existing and justly exercised would all be in vain, and the public benefits to accrue therefrom would be in reality largely impaired, if not indeed destroyed. Where there has been adequate provisions made for travelers and pedestrians and vehicles, etc., and a reasonable actual apportionment between those ways of the remaining surface of a street for grass or tree plots, these plots may be

protected and guarded against unnecessary use by travelers by appropriate or suitable guards set on or within the line of such plots. These guards should reasonably conform to the purpose intended, and so with a due regard to the safety of travelers on walkways and on the street proper between the curbs. Negligence in respect of the location or of the character or of the nature of such guards, and injury in proximate consequence thereof will entail liability therefor, unless avoided by negligence on the part of the person injured." *Birmingham v. Carle*, 191 Ala. 539, 547, 548, 68 So. 22, 25, L. R. A. 1915F, 797, per McClellan, J.

"It is the duty of the city to keep its streets and sidewalks in reasonable condition and free from dangerous defects to the full width thereof." *New Albany v. Kiefer* (Ind. App. 1919), 123 N. E. 361.

"Municipal corporations are due the traveler upon their public thoroughfares, the duty of keeping these thoroughfares to the full width in reasonably safe repair for travelers by night as well as by day." *Montgomery v. Supple* (Ala.), 80 So. 139.

"As a general rule cities and towns are under a duty to exercise ordinary care to keep the whole of the street, no matter how wide it is or what part of it is used by the public, in reasonably safe condition for travel. But whether this rule should be applied in all its strictness to the whole of the street in small cities and towns is a question that admits of

municipality is under no necessity of grading such street and preparing it for use and travel the full width thereof. That is, it may exercise a reasonable discretion as to the width of the street necessary to be graded and prepared for travel.²⁷ Sidewalks are required to be kept in a reasonably safe condition their entire width.²⁸

Obstructions on an unimproved portion of street between the walkway and the property line may create municipal liability.²⁹ In a Pennsylvania case a street had been widened and under direction of the city a trench along the untraveled portion of the street was built for the purpose of constructing a sewer. Temporary crossings were placed over the trenches in front of the houses along the street. These crossings, as stated by the court, constituted an invitation to those occupying the houses and to those visiting such houses to use the crossings; therefore, it was held, the obligation arose on the part of the city to safeguard and light such crossing at night, and where one fell into the trench from a crossing at

considerable doubt. * * * Of course, if the population and business of the city and the reasonable needs of the traffic require the whole of the street, then the whole of it must be kept in condition to accommodate the traffic." Court declined to lay down an arbitrary rule requiring small cities and towns to keep the whole width of their streets in reasonably safe condition for travel. *Lancaster v. Broadus* (Ky. 1919), 216 S. W. 373, 375.

²⁷ "In the business part of a town or city it will ordinarily be considered necessary to grade and prepare the entire width of the street for public travel and the carrying on of the traffic of the city, while in another part of the city it may not be deemed necessary to grade and prepare more

than a sufficient width to enable teams and conveyances to pass readily each other on the grade." *Smith v. Rexburg*, 24 Idaho 176, 181, 132 Pac. 153, per Ailshie, C. J.

Need not keep street in condition for travel its whole width. *Short v. Carbondale*, 249 Pa. 564, 95 Atl. 254.

"The city is not generally bound to improve and make fit for travel the whole width of an outlying street. If it improves and keeps in condition a roadway of sufficient width for the ordinary demands of travel that is sufficient." *Miller v. Duluth*, 134 Minn. 418, 159 N. W. 960.

²⁸ *Andrews v. White Hall*, 184 Ill. App. 298.

²⁹ *Miller v. Missouri Wrecking Co. (Mo.)*, 187 S. W. 45.

night, due to a violation of such duty, municipal liability was affirmed.³⁰

§ 2743. Sidewalks.

The duty of the municipality to exercise reasonable care to keep its sidewalks and footways in a reasonably safe condition for passage by the public extends to all such public ways opened and intended by the municipal-

³⁰ "When the city so subjected the land it had acquired for the use contemplated it was bound to use every reasonable precaution to prevent injuries to those who might use the highway in obtaining ingress and egress over the improvement to and from the buildings abutting thereon. What is required is reasonably safe precautions considering the nature and character of the work and the extent of travel it was necessarily subjected to. If the city had closed the street to public travel and provided other means to reach the property, this plaintiff would have been bound thereby. When temporary crossings were placed as described in front of the houses, as an invitation to those occupying the houses and those visiting them to use the crossings, it was necessary for the city as well properly to guard and light such crossings at night as would reasonably protect persons using them. Whether the city is liable for defects within the lines of a street, but outside its traveled way or path, depends to some extent upon the location of the street, and the use that is made of the street outside the traveled way. It has been held that in closely built up portions of the city it is the duty of the author-

ities to keep the entire street in a safe condition. (*Monongehela City v. Fischer*, 111 Pa. 9). The rule in districts other than closely built up communities depends to some extent upon municipal action with respect to the street, the intention to preserve the highway as a country road, and the use which of necessity must be made, or through convenience, is made of the portion outside the traveled way. * * * Where the use of the part not actually subjected to public travel is reasonably convenient to the enjoyment of the built up properties abutting thereon, while the city may not be required to keep level and free from defects all of the unused portion of the street, it would be required to keep the path of ingress and egress to and from the buildings reasonably free from obstructions; it would not be permitted to leave unguarded and unlighted at night time a trench 17 feet deep with a bank of earth 10 feet high on the side thereof. * * * The street having been left open for public travel with the temporary crossings in place brings the case in line with *Johnson Co. v. Philadelphia*, 236 Pa. 510, as to the liability of municipalities for injuries resulting from the work of an independent contractor in re-

ity for general use,³¹ and over which the municipality exercises or may exercise full control,³² irrespective of

pairing a street." *Gerber v. Philadelphia*, 60 Pa. Super. Ct. 119, 123, 124, 125.

³¹*Ft. Worth v. Nelson* (Tex. Civ. App. 1920), 220 S. W. 123, citing § 2743, vol. 6, ante.

"The duty of municipal corporations is to see that their sidewalks are in reasonably safe condition for persons exercising ordinary care and prudence." *Goodwyn v. Shreveport*, 134 La. 820, 64 So. 762.

It is the duty of the city to keep the approach to its public markets in a reasonably safe condition for public travel. *Burke v. Baltimore*, 127 Md. 554, 96 Atl. 693, 696.

"But the rule is invoked that the acceptance of the streets did not impose on defendant the duty of keeping the whole width of the streets in repair but only those portions the city had elected to open and prepare for the use of the public, and that since the sidewalk space in question had been wholly neglected, allowed to remain in a state of nature, the city had extended no implied invitation to plaintiff to use it, and therefore owed her no duty to keep it in repair. This argument loses sight of the fact that plaintiff was not injured by a defect in a sidewalk space the city had not opened for travel but by a defect in a part of the street the city had opened to the public. The hole into which plaintiff fell was in the roadway of Eighteenth street and was caused by an inadequate intake de-

fendant had installed and had undertaken to maintain. Pedestrians had a right to cross Eighteenth street at that crossing or at any other place and the presence of the pathway certainly proclaimed the fact that the people were using that crossing. The hole, concealed as it was by surrounding weeds, was a trap, a snare to the feet of the luckless traveler that happened to pass that way in the night.

Paraphrasing what we said in the recent case of *Colton v. Kansas City*, 162 Mo. App. 1, c. 433, we may eliminate all idea of sidewalk space and of a pathway in a sidewalk space, for the safety of which it is contended the city would not be liable, and stand upon the fault of the city in constructing and maintaining an inadequate inlet in the street and in suffering it to become a menace to the safety of people using a pathway over an unimproved part of the street. For such act the city would be liable to one who reached the pit by a pathway over which the city had assumed no control." *Twedell v. St. Joseph*, 167 Mo. App. 547, 551, 552.

³²In one case it was held that there was no municipal liability for the death of a boy, 11 years old, occasioned by his having projected his head and shoulders under the upper part of elevator, operated by a hotel proprietor in a sidewalk alleged to have been a public one, so that in its descent it caught and crushed him. The

the question by whom established or constructed,³³ for their entire width,³⁴ and is not restricted to keeping in

sidewalk running along the side of a hotel and bordering a public street was used by the public generally, and by permission of the city the hotel company installed and operated the elevator. It appeared that the title to the land covered by the sidewalk was in the hotel company, and there was no proof of a formal dedication thereof to the city for sidewalk purposes, nor of any other act of recognition thereof as a public sidewalk by the municipal authorities. The street as surveyed and originally accepted by the city did not cover the strip but the hotel company made it a sidewalk. However, the court stated that "practically, if not legally, the hotel company added the strip to the public way, which the city controlled as a highway. The application of the hotel company for the permit implied admitted the sidewalk was a public one in the true sense of the term, one under city control, and the grant of it carried an implied assertion of such character by the city. Very slight corporate recognition of a way so laid out and used by the public suffices, and it may be implied as well as expressed. * * * That the hotel company owns the fee, and constructed and maintained the sidewalk signified little or nothing, since nearly all owners of property abutting on streets do that and not infrequently set back their fences and buildings, so as to widen the street, thereby adding to a thing controlled by the city or

town. The sidewalk is undoubtedly a public one for the purpose of actions of this class." "The uses of highways other than travel or transportation thereon are lawful, and should one in the exercise of such right, injure another otherwise than by making the highway unsafe, there is no reason or sound principle upon which the city can be held liable. An abutting owner has peculiar, limited, common law rights in highways not enjoyed by others which statutes and city ordinances have not interfered." The court held the elevator was not a defect in the sidewalk, not dangerous to persons using the sidewalk, that it was not a public nuisance and was not an obstruction thereto. Moreover, "the fatal injury resulted not from the ordinary use of the sidewalk or any defect in it, but from the thoughtless act of the boy in projecting his head under the machine, as in the case of one putting himself under or in the way of a vehicle in the street, or under a skid used in handling freight of a barrel rolled from a wagon over skids to a sidewalk or into the front door of a store." *Post v. Clarksburg*, 74 W. Va. 48, 81 S. E. 562, per Poffenbarger, J.

³³ The construction of a sidewalk on a public street by abutting property owners with the city's consent, etc., as it is invitation to public use, etc. *Dolding v. St. Charles*, 166 Mo. App. 403, 407, 408, 149 S. W. 51.

³⁴ *Andrews v. White Hall*, 184 Ill. App. 298.

safe condition a special or particular part only of such ways which part may happen to be most generally used.³⁵ The invitation on the part of the municipality to use such ways imposes the obligation.³⁶

³⁵ *Atlanta v. Hampton*, 139 Ga. 389, 77 S. E. 393, 395; *Atlanta v. Milam*, 95 Ga. 135, 22 S. E. 43; *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389.

³⁶ Defective wooden culvert as part of roadway of street used as a footway. *Browning v. Aurora*, 190 Mo. App. 477, 480, 177 S. W. 685.

“But it must always be remembered that it is not the improvement of the street that fixes liability for neglect of duty. It is the invitation on the part of the city to use that portion of the street on which the traveler is injured that renders the city liable for neglecting to keep such portion in a reasonably safe condition for travel. Of course, the fact that the city has improved, or has sought to repair, the portion of the street where the injury occurred is evidence that such portion has been given and opened to the public for use, but if that can be shown by other facts, it will be sufficient.

“In this case the street was level and smooth, fit for travel from property line to property line without anything being done to it. When it is shown that such a street has been opened to the public for use the invitation is that every part thereof suitable for travel must be used. When the roadway between the curb lines was graded and properly shaped up leaving an eight foot space on the

east side of the street for a sidewalk, and in good condition for use as such without anything further to be done to it in order to make it suitable for travel, there is nothing to indicate to the traveling public that the invitation to use the street is limited to the roadway portion. Nor indeed, was the invitation limited thereto in this case, for a crossing led from the southeast corner of Eighteenth and Engineer streets west across the latter to the north end of the sidewalk space in question. And as no actually constructed sidewalk led on from the termination of this crossing, it was in itself an invitation to the public to use the strip running south along the east side of Engineer street as a sidewalk. The city engineer admitted on cross examination that there was a walk there and that the strip was ‘left there for people to walk on,’ but said there was no granitoid or other paving walk there. For several years, the public had accepted the invitation, thus extended, and had used the strip as a sidewalk, and after these conditions had become established, a row of stakes was driven in the space thus left for and used as a sidewalk, and these stakes rendered it dangerous and unsafe. A sidewalk, as its name indicates, is nothing more than a side walk, that is, a path or way for the use of foot passengers at the side of a street. Usually it is paved and this is so

§ 2744. Same—sidewalks partly or wholly outside limits of streets.³⁷

No municipal liability exists for defects in a private walk leading from the sidewalk to a store building on pri-

often the case that in using the term 'sidewalk' we think of the construction as constituting the sidewalk. But, as stated before, it is not the constructing of a paved pathway that renders the city liable for a failure to keep it reasonably safe, it is the invitation on the part of the city to the public to use the way for a walk. And that invitation may be extended, as in this case, by other ways than by having a paved walk constructed thereon. This is not a case where a portion of a street is left in a state of nature so unfitted for use as a walk that the city cannot be said to have invited the public to use it. The conceded facts show that the strip was left for people to walk on; that it was fit and suitable for that purpose; that a crossing led directly to it and nowhere else since there was no built walk from there on in any other direction. And the injury was caused, not by some natural and inherent defect in the strip, but from something placed there after the invitation to use the walk has been extended and accepted. 'A city like the humble village or country town may leave its streets as dirt roads, and yet be liable for defects negligently allowed to exist in them.' (*Benton v. St. Louis*, 217 Mo. 687, 1, c. 701). As said in *Brennan v. City of St. Louis*, 92 Mo. 482, 1, c. 487, 'while it must be conceded that much discretion lies

with the city government, as to how and of what material the streets and sidewalks shall be made, yet, when a street is thrown open to the public use; as this one was, it is the duty of the city to keep the same in a condition reasonably safe for persons traveling thereon, with ordinary care and prudence.' To the extent that the city sanctions the use of a street by the public as a thoroughfare can the city be justly held liable for lack of ordinary care to maintain the thoroughfare in a reasonably safe condition for such use. (*Baldwin v. City of Springfield*, 141 Mo. 205, 1, c. 212). And in the case at bar, the conceded facts show that the city's invitation to use the street was not limited merely to the roadway but extended also to the space left as a sidewalk for the people to travel on. It not only formed a suitable sidewalk for pedestrians but there was no other place so suitable for them to travel as here and a crossing led directly to it so that it might be used. The proof that the city has invited the public to use a thoroughfare is not confined to the ordering a constructed walk thereon. It may be shown in other ways. (*Meiners v. City of St. Louis*, 130 Mo. 274, 1, c. 284.)" *Jackson v. Sedalia*, 193 Mo. App. 597, 601 to 604, 187 S. W. 127, per Trumble, J.

³⁷ *Ft. Worth v. Nelson* (Tex. Civ.

vate property used as an approach to and from such building by persons going to and from the store where the walk was built by the owner of the building with neither authorization or approval by the city, nor no assumption or attempt at assumption of municipal control.³⁸ So injury due to falling on steps which were not a part of the sidewalk leading from the sidewalk to a private building used as a post office, as the injured person was entering the building from the sidewalk, creates no municipal liability. The steps consisted of two cement steps placed on the sidewalk directly in front of the door by the owner of the building.³⁹

App. 1920), 220 S. W. 123, citing § 2744, vol. 6, ante.

Sewer pipe. Pedestrian tripped over sewer pipe left on or near sidewalk. Entire space between the property line and the curb was not occupied with the board sidewalk, a part of which being set in grass, and called a grassplot or parkway. For the purposes of a particular case such entire space may be considered as the sidewalk which it was the duty of the city to keep in a reasonably safe condition. *Hutchinson v. Mullins*, 189 Mo. App. 438, 176 S. W. 1083, 1088.

³⁸ The store building stood back from the line of the street about four feet. Plaintiff in going to the store on stepping upon the walk immediately adjacent to the building a defective plank due to decay gave way throwing and injuring plaintiff. The private walk was of plank. The defect complained of was in that part of the walk which was on the private property of the owner of the building, and the case was disposed of upon that basis. The court stated

that as there was neither authorization or approval by the city to the construction of the walk, nor was there any assumption or attempt at assumption of municipal control of that portion of the walk between the lot line and the building, the point where the injury occurred, no obligation rested on the city to take charge of the walk and keep it in reasonable repair. "The rule might have been different had the city in fact assumed jurisdiction of that part of the walk and treated it as a part of the public thoroughfare." The walk was not intended as a part of the street sidewalk for the use of the public at large, but was intended solely to give an approach to the store building. *Holmwood v. Duluth*, 134 Minn. 137, 158 N. W. 827.

³⁹ In holding the city not liable the court said: "We are satisfied that no cause of action was stated or proof against the defendant. The accident did not occur upon the sidewalk, nor was it occasioned by an obstruction to the sidewalk, but by the slippery condition, and

§ 2745. Same—failure to construct sidewalks as distinguished from failure to repair.

“There is no legal obligation resting upon a city to build sidewalks. In the first instance it may leave its streets in a state of nature and not be responsible for not having improved them, but if it chooses to improve them and thereby extends to the public an invitation to

perhaps, defective condition of steps which were erected by a private individual unto a private building which was used by the United States as a post office. We find no cases in the books where a city has been held liable for a defective entrance to a private building and not upwards to the level of the post office floor no one would have contended that the city would have been liable if a person had fallen upon the lower steps, nor would they contend that the city would have been liable if he had fallen on the upper one and before reaching the sidewalk. There can be no difference between such a case and one where the steps arise above the sidewalk. If a person traveling along the sidewalk has fallen against the protruding steps on a dark night and the action had been maintained on the theory that a portion of the sidewalk had been obstructed, a recovery might possibly have been had, but here the injury was occasioned not while traveling upon and passing along the sidewalk but while entering into a private building and upon a portion of that private building. It is clear, indeed, that if there had been no steps there would have been no way of entering the building from the sidewalk and though the pub-

lic is required to keep its sidewalks in reasonably safe condition and repair, it is not required to construct a stairway or steps which shall lead into private buildings, nor is it required to keep the same in safe and proper condition. What duty, in short, did the city violate and what breach of duty on its part was there which occasioned the injury? for authorities supporting our conclusion, see *Goodin v. Des Moines*, 55 Ia. 67, 7 N. W. 411; *Fitzgerald v. Berlin*, 64 Wis. 203, 24 N. W. 879; *Smith v. Wendell*, 7 Cush. (Mass.) 498; *James v. Wellston Township*, 18 Okl. 56, 90 Pac. 100, 13 L. R. A. (N. S.) 1219, 1240, 1241, 11 Ann. Cas. 938; *Stricker v. Reedsburg*, 101 Wis. 457, 77 N. W. 897. We are not unaware of the cause of *Estelle v. Crystal Lake*, 27 Minn. 243, 6 N. W. 775. In that case, however, the accident did not occur while entering or leaving the building from the platform which was placed upon the sidewalk and extended past the building, but while falling off the platform itself, which was a part of and took the place of the sidewalk, and was placed in the street to be used as a part of it.” *Ellingson v. Leeds* (N. D.), 169 N. W. 85, per Bruce, C. J.

walk upon them, it must use reasonable diligence to keep them in repair. It cannot shift responsibility having once assumed it without giving persons who may be injured by defective walks some reasonable adequate remedy for such injury.”⁴⁰

§ 2748. Alleys.⁴¹

The fact that the place in controversy was an alley does not absolve the city from keeping it in reasonably safe condition for travel.⁴²

§ 2749. Bridges.

A defect in a bridge, resulting in injury, constructed by a municipality and designed for the use of pedestrians in passing from a street to a sidewalk, may create liability, since the municipality is under obligation to exercise ordinary care to keep such bridge in reasonable repair for proper use.⁴³

⁴⁰ Caviness v. Vale, 86 Or. 554, 169 Pac. 95, 98.

⁴¹ Steam pipes in a public alley struck by teamster driving team through the alley. Fanning v. Chicago, 194 Ill. App. 574.

⁴² “This is recognized in *Mehan v. St. Louis*, 217 Mo. 35, 46. And it is so stated in *Elliott on Road and Streets*, section 25. An alley is but a narrow street.” *Asbury v. Kansas City*, 161 Mo. App. 496, 499, 144 S. W. 127.

⁴³ The bridge had been built by the city over a drain, gutter or ditch along side one of the public streets of the city. The drain formed no part of the sidewalk, but properly speaking it was a part of the street. The bridge was unsound and unsafe and this was known to the officers of the city. A pedestrian in passing over

the bridge stepped upon a decayed plank which broke and injured him which injury caused his death. “It will be noted that the bridge was not a cross walk at the intersection of two streets, but evidently was built by the city for the use and convenience of the public who desired to go from the street to the sidewalk beyond, and from the record it appears that the public made use of this bridge for this purpose.” In distinguishing *Crawford v. Griffin*, 113 Ga. 562, 38 S. E. 988, the court said: “In the present case the city constructed the bridge and it was constructed on the street, and it was evidently intended for the use of the general public—pedestrians going from the street to the sidewalk. It is unnecessary to hold that the city was under a duty to build the bridge,

IV. LIABILITY FOR ACTS OF OTHERS.

§ 2750. May be liable for the acts of third persons.

Where the duty is imposed by statute or charter upon municipal corporations to use ordinary care to keep their public ways in reasonably safe condition for travel, or where the obligation is recognized by law, the fact that the defect, obstruction or danger in such ways, resulting in injury, was due to the act or omission of a third person does not necessarily relieve the municipality of liability therefor.⁴⁴ Nor does the fact that such third per-

as it must be clear that they were empowered to do so. In fact, it would be seen that the city was doing the proper thing when it built the bridge. It is especially true that the public is entitled to the use of the highway from end to end and from side to side, where the highway is a street, an urban highway. In the very nature of things, the public cannot be confined to the beaten paths. There is usually, in the cities of the size of Corinth, no reason why pedestrians should not cross the street elsewhere than at the intersection of streets, and where a city builds a bridge for the use of pedestrians, and thereby invites them to use same, we can see no sound reason why the city is not under obligation to keep the bridge in reasonable repair." *Hardin v. Corinth*, 105 Miss. 99, 62 So. 6.

⁴⁴ *Alabama. Birmingham v. Carle*, 191 Ala. 539, 68 So. 22, L. R. A. 1915F, 797; *Perrine v. Southern Bithulithic Co.*, 190 Ala. 96, 66 So. 705.

Iowa. Holmquist v. C. L. Grady Const. Co., 169 Iowa 502, 151 N. E. 828.

Kansas. Tepfer v. Wichita, 90 Kan. 718, 136 Pac. 317.

Kentucky. Schmidt v. Newport, 184 Ky. 342, 212 S. W. 113; *Eagan v. Covington*, 166 Ky. 825, 179 S. W. 1026; *Owens v. Georgia Life Ins. Co.*, 165 Ky. 507, 177 S. W. 294.

Michigan. Repperd v. Chapin, 190 Mich. 19, 155 N. W. 706.

Missouri. Miller v. Missouri Wrecking Co. (Mo.), 187 S. W. 45; *Kinloch Tel. Co. v. St. Louis*, 268 Mo. 485, 188 S. W. 182.

North Carolina. Conway v. Kingston, 169 N. C. 577, 86 S. E. 524; *Ridge v. High Point*, 176 N. C. 421, 97 S. E. 369.

Washington. Wilton v. Spokane, 73 Wash. 619, 132 Pac. 404; *Seattle v. Shorrocks*, 100 Wash. 234, 170 Pac. 590; *Spokane v. Crane Co.*, 98 Wash. 49, 167 Pac. 63.

Liable for defective railroad crossing constructed by the company which result in injury. *Hammond v. Jahuke*, 178 Ind. 177, 99 N. E. 39.

Pole erected by a light company fell and killed a pedestrian. *Borough v. Kost* v.

son may be primarily liable exonerate the municipality from responsibility therefor;⁴⁵ for example, an abutting property owner,⁴⁶ an independent contractor,⁴⁷ or an oc-

Ashland Borough, 236 Pa. 164, 84 Atl. 691.

Excavations in streets made by third persons with city's permission, city held liable for their negligence, etc. "The city can be held responsible only for injuries occurring from negligence during the progress of the work, or for failure to exercise ordinary care as to the safe condition of the street by inspection after the completion of the work." *Seagraves v. Winston*, 167 N. C. 206, 83 S. E. 251, following *Bailey v. Winston*, 157 N. C. 252, 72 S. E. 966.

⁴⁵ Third person may be liable for defective sidewalk. "This liability of the original wrongdoer is not dependent upon the existence of any ordinance declaring his liability, nor upon the fact that there has been no notice given to the wrongdoer to repair the sidewalk. He is liable because of his active fault in producing the defective condition." *Topeka v. Central Sash & Door Co.*, 97 Kan. 49, 154 Pac. 232.

Permitting a sign to be suspended so low over a sidewalk that a pedestrian struck his head against it and was injured. City may be liable; fact question. *Baillie v. Wallace*, 24 Idaho 706, 135 Pac. 850.

One causing a nuisance in a street which results in injury is liable primarily, and the municipality secondarily for negligence for failure to abate, provided it had notice or should have had,

etc. *Conway v. Kingston*, 169 N. C. 577, 86 S. E. 524; *Guthrie v. Durham*, 168 N. C. 573, 84 S. E. 859.

⁴⁶ Injury due to sewer box in a sidewalk. Primary liability of the owner of property will not relieve the city. *Waterbury v. Clark*, 91 Conn. 254, 99 Atl. 578.

Drain pipe constructed in a sidewalk by abutting land owner, city liable for injury, though landowner is primarily liable. *Louisville v. Metropolitan Realty Co.*, 168 Ky. 204, 182 S. W. 172.

Although abutting owners may be made liable for defective sidewalks resulting in injury where the municipality has been given full control of public ways with adequate means for keeping them reasonably safe and passable, the exercise of such powers carries with it the corresponding obligation to perform the duty. The duty is primarily, in such case, upon the city, not upon the adjoining landowners. *Willis v. Parker*, 159 N. Y. S. 676, 173 App. Div. 552.

The primary responsibility for damages occasioned by neglect to keep the sidewalks in repair rests upon the municipality, and not upon the property owner. Rule applied, where pedestrian was on a sidewalk which fell, due to defective vault built by property owner. *Gottlieb v. New York*, 149 N. Y. S. 589, 164 App. Div. 225, following *Rochester v. Campbell*,

cupant of property bordering on a public way.⁴⁸ When changes are made in a public street by some one independent of the city, and acting, for example, under direct legislative authority in providing for the abolition of grade crossings, or for some other public work, such city is not relieved from its statutory liability for injury to a traveler by a defect in the street, if the city has not actually closed such street to public travel.⁴⁹ The responsibility and duty of the city in a late New York case is stated thus: "Upon no theory can the city be held

123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760.

Abutting owner not liable for sidewalk defects not caused by him. *Dedrick v. Schinasi*, 167 N. Y. S. 327, 179 App. Div. 763; *Hillard v. Noe* (Mo. App.), 198 S. W. 435.

Cellar door projecting upon the sidewalk. *Bannister v. St. Paul*, 131 Minn. 448, 155 N. W. 627.

One maintaining a trap door in a sidewalk adjoining his premises in a defective condition is liable to a pedestrian injured by stepping on it in the exercise of due care. *De Lor v. Symons*, 93 Wash. 231, 160 Pac. 424.

Pedestrian injured by defective covering of an areaway beneath the sidewalk. Abutting owner, held liable, irrespective of the statutory duty of the city to keep its sidewalks in reasonably safe condition. *Mooney v. Hauck*, 1 Ohio App. 432, 35 Ohio Cir. Ct. R. 134.

Laws imposing duty on abutting owners to repair sidewalks, may make such landowners liable directly to a pedestrian using a sidewalk with due care who is injured because of defect therein, resulting from landowner's negligence in making the repairs. *Madden v. Delaware, L. & W. R. Co.*, 234 Fed.

731, 734, et seq., affirmed 241 Fed. 808, 154 C. C. A. 510.

⁴⁷ Contractor excavating subways and planking street. Under same duty as city as to safety of street. *Schmidt v. New York*, 167 N. Y. S. 23, 179 App. Div. 667.

Notice of defect to contractor working on street is not required. *Marmer v. Richard Carvel Co.*, 167 N. Y. S. 850.

Street in course of reconstruction by city through contractor, one half of which was left open for public travel. Bicycle rider ran into a hole in street or against brick, was thrown and run over by coal cart. City held liable. *Bickel Asphalt Paving Co. v. Yeager*, 176 Ky. 712, 197 S. W. 417.

⁴⁸ Garage making sidewalk adjoining premises greasy resulting in injury to pedestrian is liable. *Grinage v. McGlinchey*, 62 Pa. Super. Ct. 295; *Patterson v. Philadelphia*, 56 Pa. Super. Ct. 651.

Coal hole in sidewalk left open; maintained by occupier of adjacent premises. *Cole v. Durham*, 176 N. C. 289, 97 S. E. 33.

⁴⁹ *Gilbane v. Lent*, 41 R. I. 462, 104 Atl. 77, 81.

liable, for the work done or authorized or required by the Public Service Commission, or for negligence on the part of the commission or its contractors," but on notice, it is incumbent on the city under its general duty to keep the surface of the streets in a reasonably safe condition for public travel, to shut off or divert public travel, at a point of danger, due to laying a subway or gas pipes, or to place the street in a reasonably safe condition.⁵⁰ Where the fault is due to a third person, it is familiar that the municipality's liability is dependent on notice, actual or constructive, of the defect.⁵¹

§ 2751. Liability for negligence of licensee.⁵²

§ 2752. Same—licenses for amusements, shows or fire-works in streets.⁵³

⁵⁰ O'Brien v. New York, 170 N. Y. S. 592, 182 App. Div. 810.

⁵¹ Section 2807, post; § 2807, vol. 6, ante.

⁵² Connecticut. Fitch v. Hartford, 92 Conn. 365, 102 Atl. 768.

Georgia. Bonner v. Standard Oil Co., 22 Ga. App. 532, 96 S. E. 573.

Iowa. Erickson v. Manson, 180 Ia. 378, 160 N. W. 276.

Kentucky. De Garmo v. Vogt, 151 Ky. 847, 152 S. W. 969.

Massachusetts. O'Donnell v. North Attleborough, 222 Mass. 591, 111 N. E. 374.

West Virginia. Johnson v. Huntington, 80 W. Va. 178, 92 S. E. 344.

Water service box to supply water to a fountain was erected in a street by a company by permission of the city in front of its property. Pedestrian stepped into the opening into the water box—the lid being off—and was injured.

The abutting property owner was held primarily liable, as well as the city. Hippodrome Amusement Co. v. Carius, 175 Ky. 783, 195 S. W. 113.

Notice. Obstructed by building material. Duty of city to take notice of the nature and character of the obstruction which it has authorized. Gnau v. Ackerman, 166 Ky. 258, 179 S. W. 217.

Where the city has authorized the placing of obstructions in the street, notice to the city is not necessary to render it liable. Schlinski v. St. Joseph, 170 Mo. App. 380, 388, 156 S. W. 823.

Obstruction due to electrical wires, creates municipal liability only on due notice or where the proper exercise of care would have acquainted the city authorities with the dangerous condition, with a fair chance to correct. Shawnee v. Sears, 39 Okl. 789, 137 Pac. 107.

⁵³ Display of fireworks by citi-

§ 2752a. Same—permitting racing in streets.⁵⁴

In a late South Carolina case a municipality was held liable for injuries to one struck by an automobile using a main street and running at a high rate of speed in practice for hill climbing, with knowledge and consent of the municipality, on the ground that such use rendered the street unsafe for travel and customary street purposes.⁵⁵

zens committee as a nuisance respecting place of display. *Sroka v. Halliday*, 39 R. I. 119, 97 Atl. 965, 973.

Baseball game. Traveler on street was struck by a baseball from which injury he died. The basis of the cause of action was the allegation that the city negligently allowed its public streets to become unsafe for travel, in that certain boys were permitted without molestation to play ball thereon. The evidence established that certain boys had a custom of collecting on the street and playing ball in the evening which custom had been going on for two years and was known to the police officers of the town and no effort had been made to stop it. Held, there was no municipal liability. *Goodwin v. Reidsville*, 160 N. C. 411, 76 S. W. 232.

Merry-go-round, run by an engine. *Malchow v. Leoti*, 95 Kan. 787, 149 Pac. 687, L. R. A. 1915F, 568.

Shooting gallery. There is no municipal liability to one injured from a stray bullet from a shooting gallery as part of a street carnival, suffered by municipal authorities. Although the officers had no permission under the law to permit the exhibition and disregarded their duty in failing to

abate the shooting gallery, the city, "as a municipal corporation of the state, and exercising its public functions, is not liable for the damages which resulted from the nonfeasance or malfeasance of its officers." *Trower v. Louisiana*, 198 Mo. App. 352, 200 S. W. 763, 770.

Street carnival. *Augusta v. Jackson*, 20 Ga. App. 710, 93 S. E. 304.

Street carnival permitted, including an automobile race where a bystander was killed, held city was not liable. *Rose v. Gypsum City (Kan.)*, 179 Pac. 348, approving *Everly v. Gas*, 95 Kan. 305, 307, 147 Pac. 1134, L. R. A. 1915E, 448.

⁵⁴Section 1364, vol. 3, ante.

⁵⁵"It is suggested by the city that the dedication of the public way to automobile racing lay wholly outside the powers of the corporation for which act the corporation is not liable. That is another way of saying that the corporation is liable if the authorities act within the law, and is not liable if the authorities act without the law. The prime duty of any city is to keep its streets clear for the public travel. The incumbrances of the streets with automobiles running at a dangerous rate of speed, just for practice, is a violation of that prime duty. The

Other cases have held that, although a state made it illegal to conduct horse races in public highways, one injured at a race held in violation of law could not recover damages therefor.⁵⁶

V. WHO MAY SUE.

§ 2754. Right to sue is limited to "travelers."

One did not cease to be a traveler when he stopped to await the coming up of his companions, and as he stood beside a telephone pole, touching the guy wire, received an electric shock and instantaneously died.⁵⁷

Under the Maine statutes, it is held, that to enable a plaintiff to recover he must have been a traveler for some purpose for which streets are required to be constructed and kept in repair. Moreover, in order to be within the protection of the statute he must be a lawful traveler. One who is traveling in defiance of a statutory prohibition is unlawfully upon the highway. Therefore, one traveling in an unregistered automobile, injured on account of a defect in the highway, was denied the right to sue, because it was adjudged that he was not a traveler within the protection of the statute, since such a vehicle was proscribed.⁵⁸

answer that the mayor and council had no authority to authorize such use of the street is to admit the wrong. It is true there are decisions from other jurisdictions which sustain this view of the respondent but they do not commend themselves to our judgment and they do not express the general rules of law. We are of the opinion that the street thus dedicated by the authorities to a haphazardous use was not then reasonably safe for prime street purposes." *Burnett v. Greenville*, 106 S. C. 255, 91 S. E. 203.

⁵⁶*Frazure v. Ruckles*, 63 Ind. App. 538, 113 N. E. 730, following

Johnson v. New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824, which was followed in *Bogart v. New York*, 200 N. Y. 379, 93 N. E. 937, 21 Ann. Cas. 466. A similar case is *Scanton v. Wedger*, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395.

Permitting automobile race in street, held city was not liable for injury resulting. *Rose v. Gypsum City (Kan.)*, 179 Pac. 348.

⁵⁷*O'Donnell v. North Attleborough*, 222 Mass. 591, 111 N. E. 374.

⁵⁸*McCarthy v. Leeds*, 116 Me. 275, 101 Atl. 448.

§ 2757. Children.

In Kentucky it is affirmed that children have as much right to use the streets as grown persons, and the city has not performed its duty when it maintains its streets in reasonably safe condition for adults, but leaves them in an unsafe condition for use by children.⁵⁹

§ 2758. Automobilists.

“Cities and towns are not required by the law to make special provisions in order to keep all their public ways at all times in condition for the safe passage of automobiles, bicycles and other mechanisms for travel newly devised and unthought of at the time when the statute imposing the general duty as to repairs of ways and liability for defects therein was enacted. But they are obliged to keep their ways reasonably safe and convenient for travel generally, having regard to all the circumstances. Automobiles are recognized by the law as a legal method of travel. Elaborate statutory provisions are made for their registration, for the licensing of those who operate them and for their management upon public ways. It is common knowledge that at present in this commonwealth a vastly larger number of people travel upon the highways in automobiles than in horse-drawn vehicles. The care as to the repair of ways cast upon municipalities by the statute has reference to all kinds of legitimate travel including that rightly undertaken in automobiles. Although special provisions for their safety are not demanded, their presence cannot be ignored.”⁶⁰

⁵⁹ *Gnau v. Ackerman*, 166 Ky. 258, 176 S. W. 217, 220, declaring liability against property owner, contractor and city for injury to child who fell into a bed of slack-ing lime, commonly known as a mortar bed, which had been placed in a carriage way of a street, dur-

ing the construction of a building.

⁶⁰ “The subject is considered fully in *Doherty v. Ayer*, 197 Mass. 241, 83 S. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355, and need not here be discussed again.” *Kelleher v. Newburyport*, 227 Mass. 462, 116 N. E. 806, per Rugg, C. J.

§ 2759. Bicycle and tricycle riders.⁶¹

The duty of the municipality is to exercise reasonable care to keep highways in suitable condition for ordinary travel, and not to take extraordinary precautions to maintain them free from ruts, holes, and unevenness, specially adapted to use thereon by bicycles, tricycles, etc.⁶²

⁶¹ Koch v. Denver, 24 Colo. App. 406, 133 Pac. 1119.

Bicycle case. Bethel v. St. Joseph (Mo. App.), 180 S. W. 401, 184 Mo. App. 388, 171 S. W. 42.

Bicycle rider fell on street and was run over and injured by a coal cart. Defect in street, holes, pits, loose rocks, brick and other debris. Bicycle ran into a hole or over a brick and threw plaintiff. Street at the point was in course of reconstruction by the city through a contractor. City, held liable. Bickel Asphalt Paving Co. v. Yeager, 176 Ky. 712, 197 S. W. 417.

Motorcycle passenger injured in park roadway as the motorcycle ran off a part paved with asphalt onto a soft strip of road. Held, no municipal negligence. "The construction of such highways under such circumstances with a hard paved surface in the middle and softer surfaces on the side is very common and the adoption of such a plan does not, of itself, constitute negligence." Sharot v. New York, 164 N. Y. S. 804, 177 App. Div. 869.

⁶² A city is not bound to make special provision for bicycles. Emelle v. Salt Lake City (Utah), 181 Pac. 266, 270.

"A city is not bound to use reasonable care to keep its streets in reasonably safe condition with

a special view to bicycles, but to keep them reasonably safe for travel in any general and usual mode, which, however, includes the use of bicycles. * * * That is to say, if the streets of cities and towns 'are reasonably safe and convenient for travel generally, they are not liable for a failure to make special provisions, required only for the safety and convenience of persons using * * * bicycles.' " Bethel v. St. Joseph, 184 Mo. App. 388, 394, 171 S. W. 42, 43, 44, quoting with approval the greater part of § 2759, vol. 6, ante, and quoting from with approval Molway v. Chicago, 239 Ill. 486, 489, 88 N. E. 486.

Planks on the floor of a viaduct were uneven, varying in different places from some one-fourth to three-fourths of an inch, and plaintiff passing over such viaduct on a bicycle struck the edge of a plank somewhat raised, fell and sustained injuries. In holding that there was no municipal liability, the court said: "In the case before us, to sustain the judgment, we must virtually say that every municipality must maintain its streets, bridges and viaducts not only in a reasonably safe condition for ordinary travel, but must use extraordinary precautions to maintain them free from all ruts, holes, projections, depressions or uneven-

VI. PARTICULAR CONDITIONS AS CAUSE OF INJURY.

a. In General.

§ 2766. Defects in plans.

Notwithstanding the constant application of the general rule of non-liability due to defective plans in late decisions,⁶³ the obligation of the municipality to be ever

ness exceeding a difference of from half an inch to an inch and a half to the general surface of the street, or be compelled to respond in damages for any accident which might be occasioned by reason of such unevenness. The unreasonableness of such a rule is the best argument against it; it would be contrary to the well established principles of law on this subject, and we must decline to entertain such a proposition." *Pueblo v. Smith*, 57 Colo. 500, 143 Pac. 281, following the rule of *Beltz v. Yonkers*, 148 N. Y. 67, 42 N. E. 401.

⁶³ Section 2633, ante.

Colorado. *Pueblo v. Smith*, 57 Colo. 500, 143 Pac. 281.

Iowa. *Griffin v. Marion*, 163 Ia. 435, 144 N. W. 1011.

Illinois. *Ryan v. Chicago*, 187 Ill. App. 163.

Kentucky. *Schmidt v. Newport* (Ky. 1919), 212 S. W. 113; *Cower v. Madisonville*, 182 Ky. 89, 206 S. W. 27.

Missouri. *Berry v. Sedalia* (Mo. App. 1919), 212 S. W. 34, 36; *Tripensee v. Jefferson City*, 174 Mo. App. 727, 161 S. W. 303; *Horan v. Independence* (Mo. App.), 176 S. W. 1061.

New York. *Hesse v. New York*, 173 N. Y. S. 827; *Gaines v. New*

York, 142 N. Y. S. 401, 156 App. Div. 789.

Oklahoma. *Duncan v. Brown* (Okl.), 172 Pac. 79.

Utah. *Shugren v. Salt Lake City*, 48 Utah 320, 159 Pac. 530; *Ward v. Salt Lake City*, 46 Utah 616, 151 Pac. 905.

Faulty contour of street and curb, which is not the proximate cause of an injury due to an automobile backing on a sidewalk and injuring a child, is not actionable negligence. *Hagerstown v. Foltz*, 133 Md. 52, 104 Atl. 267.

It is not negligence to pave a park way with asphalt for forty or forty-five feet in the middle, leaving soft strips of road on either side. "The construction of such highways under these circumstances with a hard paved surface and softer surfaces on the side is very common and the adoption of such a plan does not, of itself, constitute negligence." *Sharot v. New York*, 164 N. Y. S. 804, 177 App. Div. 869; *Flansburg v. Eldrige*, 205 N. Y. 425, 98 N. E. 750, 41 L. R. A. (N. S.) 546.

Municipality is liable only when "the pavement was inherently dangerous, or was constructed and maintained according to a plan which was not reasonably safe and which reasonably prudent person

vigilant in its exercise of ordinary care to keep its public ways in a reasonably safe condition for travel, and their customary uses should never be ignored. Thus a recent Kansas case makes this contribution: "Plans for street improvements, street lighting, and the like, are subjects committed to the judgment and discretion of the governing body of the city. When officers of a city exercise their best judgment, adopt a plan of street improvement, and following that plan, construct the improvement according to improved methods, the city is not liable at all for incidental damages, and is liable to persons using the street only in the event that the improvement is manifestly unsafe. If the plan be one which many prudent men would approve, or if it be so doubtful whether or not the improvement be dangerous for use that different minds might entertain different opinion with respect to it, the benefit of the doubt must be given to the city." With reference to a plan of street improvement where the sidewalk was some fifteen inches above the surface of the street and where it was narrowed by a building which projected out at the point where the injury occurred the court said "the city, however, rested under the positive legal duty to keep its streets and sidewalks in a condition reasonably safe for their intended use. No matter how carefully plans of improvements were considered,

would not have adopted or maintained." *Schmidt v. Newport*, 184 Ky. 342, 212 S. W. 113; *Lebanon v. Graves*, 178 Ky. 755, 199 S. W. 1066, L. R. A. 1918B, 1016.

"There is no doubt that the doctrine of a city's nonliability when the injury is directly caused by a defective plan in contradistinction to a defective or negligent execution of that plan, exists in the law. The books are fairly full of cases holding this view. * * * Nor is the doctrine bottomed on unstable or unsound legal foundations,

for when the city has through its officers in good faith exercised its best judgment in devising a plan of doing a given work, this judgment ought not to be subjected to the incongruous and changeable rules of alleged safety arbitrarily devised by shrewd counsel to fit the actionable necessities of every casualty." But if the plan adopted is manifestly dangerous, municipal liability may arise. *Henson v. Kansas City* (Mo. 1919), 210 S. W. 13, 15, 16, per Feris, J.

and no matter how faithfully the adopted plan was executed, if the result were actual peril to persons using the street with due care the duty to make and keep the streets reasonably safe for travel was not fulfilled and an action would lie in favor of one suffering injury consequent upon the breach of duty."⁶⁴ The right to devise plans has never been held to excuse the city from negligence of construction or maintenance of such plans.⁶⁵

§ 2767. Obstructions.

Whether obstructions in public ways which result in injury create liability depends, of course, upon the presence or absence of municipal negligence.⁶⁶ Particular obstructions, undoubtedly will establish such negligence,⁶⁷ but

⁶⁴ Klipp v. Hoyt, 99 Kan. 14, 16, 160 Pac. 1000.

Sudden change of grade or step down in a sidewalk built in accordance with an ordinance may render city liable. *Montgomery v. Ross*, 195 Ala. 362, 70 So. 634.

If plan of building a sidewalk renders it unsafe, in case of injury, municipal liability will arise. "It became its (city) duty to make the crossing temporarily and reasonably safe by a sufficient fill of earth or other material. In failing to do this it breached a duty it owed to the travelers thereon." *Frankfort General Ins. Co. v. Milwaukee*, 164 Wis. 77, 159 N. W. 581.

Pedestrian stepped on the cover of a manhole in the sidewalk, which tipped, threw her on the sidewalk causing injuries. An instruction that "if the jury believe from the evidence that the accident to the plaintiff was caused by the faulty design or plan of the sewer trap or manhole, the verdict should be for the defendant," was approved, where it was applicable

to the evidence. *District of Columbia v. Pierce*, 44 App. D. C. 126, 141, relying on *Johnson v. District of Columbia*, 118 U. S. 19, 21, 6 Sup. Ct. 923, 30 L. ed. 75, 77.

⁶⁵ *Birkhimer v. Sedalia* (Mo. App.), 200 S. W. 298.

A municipality is not liable for defects in plan, but after construction of catch basins, for example, they must be maintained in reasonably safe condition for public travel, and so with manhole covers in a sidewalk. *Covington v. Rosenberg*, 177 Ky. 411, 197 S. W. 786.

Negligent carrying out. *Gibson v. St. Joseph* (Mo. App. 1919), 216 S. W. 50.

⁶⁶ Section 2726, ante.

⁶⁷ Cover of manhole tilted. *Ft. Worth v. Weisler* (Tex. Civ. App.), 212 S. W. 280.

Obstruction need not be a nuisance to create liability. *Raine v. Dubuque*, 169 Ia. 388, 151 N. W. 518.

Electrical wire disarranged and a portion extending over sidewalk,

not every obstruction in a street, whether authorized or unauthorized by a municipality, constitutes a defect or a nuisance or is actionable in damages, irrespective of its character or purpose.⁶⁸ Certain obstructions which result in a temporary impediment to public transit or

may create municipal liability. *Shawnee v. Sears*, 39 Okl. 789, 137 Pac. 107.

Road roller in street injuring conductor of passing street car creates municipal liability. *Knoxville, v. Lively*, 141 Tenn. 22, 206 S. W. 180.

The obstruction was a manhole cap with casting from eight to sixteen inches in height, set solidly in the ground and near the center of one of the city streets. *Wolford v. Grinnell*, 179 Ia. 689, 161 N. W. 686, 688.

Poles in street placed by railway company upon which to string its electric power wires, may create municipal liability, as where an automobile colliding therewith. *Stern v. International Ry. Co.*, 220 N. Y. 284, 115 N. E. 759, affirming 153 N. Y. S. 520, 167 App. Div. 503.

Fence, wire and other barrier around a parked strip, etc. Pedestrian was injured and city was held liable. *Barnesville v. Ward*, 85 Ohio 1, 96 N. E. 937.

Negligently maintaining a ladder on one side of the street which fell on plaintiff. *Spalding v. Kansas City*, 173 Mo. App. 698.

Contractor stretched a rope across a street so as to obstruct a small portion to persons in vehicles, held negligence was a question of fact. *Wallower v. Webb City*, 171 Mo. App. 214, 156 S. W. 48.

Pile of material. *Luckey v. Kan-*

sas City, 169 Mo. App. 666, 155 S. W. 873.

"A municipality must not allow detached vehicles or other obstructions to be and remain constantly in a street at a point which will render the street not reasonably safe for travel by the public. To permit this will ordinarily be regarded as negligence on the part of the city." *Louisville v. Vaughn*, 180 Ky. 681, 203 S. W. 546.

The street was undergoing improvement and a pedestrian was injured when he undertook to step over a cable in the street which was in use in the improvement, and as he was doing so the cable tightened suddenly whereby he was injured. Negligence of city and of the pedestrian held to be question for the jury. *Zellers v. Bellingham*, 83 Wash. 601, 145 Pac. 613.

⁶⁸ The liability of the city due to obstructions is often a question of fact for the jury. *Superior v. Olt*, 239 Fed. 100, 152 C. C. A. 150; *Wolford v. Grinnell*, 179 Iowa 689, 161 N. W. 686; *Caston v. Rock Hill*, 107 S. C. 124, 92 S. E. 191.

Steam pipes in public alley as obstruction to team. *Fanning v. Chicago*, 194 Ill. App. 574.

Guy wire. *Erickson v. Manson*, 180 Iowa 378, 160 N. W. 276.

Lumber pile in street contrary to ordinance. *Ridge v. High Point*, 176 N. C. 421, 97 S. E. 369.

travel are legitimate street uses.⁶⁹ The carriage and delivery of fuel, merchandise, household goods, etc.,⁷⁰ the deposit of building material,⁷¹ necessary or desirable improvements or repairs in public ways, by the municipality, its contractor, or in sidewalks by property owners,⁷² excavations and consequent obstructions, due to improvements of the several kinds by adjacent landowners,⁷³ are familiar instances.⁷⁴

The duty of the municipality to take proper precau-

⁶⁹ Section 1337, ante.

⁷⁰ Section 1339, ante.

⁷¹ Section 1340, ante.

Hutchinson v. Mullins, 189 Mo. App. 438, 176 S. W. 1083.

Obstructed by building material allowed by city. In such case the city is required to take notice of the nature and character of the obstructions. *Gnau v. Ackerman*, 166 Ky. 258, 179 S. W. 217.

⁷² Due to repairs, no liability if signals, etc. *Tegtmier v. Covington* (Ky. 1919), 209 S. W. 382.

⁷³ Section 1343, ante.

⁷⁴ The public right to the use of the street is subject to necessary restrictions which are reasonable. "While the carriage and delivery of fuel, grain and goods, or the deposit of building material in a street, may effect a temporary impediment to the right of public transit or travel, they are legitimate uses of the highway, notwithstanding its primary purpose is for public use. The same result may arise from necessary improvements in the street itself, or the improvement of abutting lots by excavations for cellars and for the foundations of buildings, the erection of buildings and similar private uses. These render necessary or unavoidable the occupation of

parts of the streets and sidewalks; and such impediments do not necessarily constitute encroachments upon the public easement. They are merely incidents or limitations upon its use. Because such improvements are necessary, the material required therefor, and the scaffolds and other convenient instrumentalities, rightly may be placed in the street, if properly done and not unreasonably continued. But when occupied for these purposes, whether with or without permission of the municipality, the duty devolves upon it to see that the licensee or owner exercises due care in the erection or maintenance of such structures or obstructions to prevent injury to persons using the street in a lawful and proper manner, either by enclosing the street or that part of it so occupied by barriers, or giving warning by lights, or in some other reasonable manner calling attention to the existing danger." *Johnson v. Huntington*, 80 W. Va. 178, 92 S. E. 344, 346.

That is to say, in case of necessity such city or town may permit a temporary obstruction of any one of its public streets or sidewalks, but it is bound to take proper precaution to warn the pub-

tions to warn the public by guards or barriers, and lights at night, or in some other reasonable manner of the danger occasioned by the obstructions is uniformly enforced, and failure in this respect is negligence.⁷⁵ The conditions may require the municipality to close the street or to forbid public travel thereon at the point of obstruction and danger, or to divert travel therefrom, or to place the street in a reasonably safe condition for proper use.⁷⁶

lic of the danger occasioned by the obstruction. *Stanton v. Parkersburg*, 66 W. Va. 393, 66 S. E. 514.

⁷⁵ Building material unguarded at night. *Killeen v. St. Cloud*, 136 Minn. 66, 161 N. W. 260.

Obstruction due to repairing the street. Proper precautions were taken by the city to prevent accident; no liability. *Heaphy v. United States Wood Preserving Co.*, 146 N. Y. S. 377, 161 App. Div. 161.

Temporary obstruction of street properly guarded by city will not create liability. *Lawrenceburg v. Lay*, 149 Ky. 490, 149 S. W. 862.

At the time of the accident the city was engaged in making repairs upon the street, and in the course of its operations stretched a rope across the street and the deceased, while riding upon a motorcycle, came in contact with the rope was thrown from the motorcycle, and sustained the injuries from which he died. The course pursued by the city was in conformity with the customary practice of cities in such cases. It is a matter of common knowledge that where the use of a street is being temporarily obstructed, ropes are stretched across to give warning to the public. "Travelers upon a highway are expected to

use their senses and to take reasonable precautions for their own safety; and to a person in the possession of his senses and in the exercise of reasonable care a rope three-fourths of an inch in diameter stretched across a street is reasonably sufficient to guard against accident." Court held there was no actionable negligence upon the part of the city. *Cook's Adm'x v. Danville*, 116 Va. 383, 82 S. E. 90.

⁷⁶ If a street is temporarily obstructed on account of public improvements it is incumbent on the city under its general duty to keep the surface of the streets in a reasonably safe condition for public travel, if necessary, to shut off or divert public travel at the point obstructed, or to place the street in a reasonably safe condition. *O'Brien v. New York*, 170 N. Y. S. 592, 594.

Street closed for repairs. "It is a well established rule that a municipality may entirely close a street while repairs are going on, and if a street is so closed there is no liability for injuries, provided the closed condition of the street is properly indicated by barriers reasonably sufficient in size and character to warn travelers, and to impart notice that the

To be actionable the obstruction must be dangerous, and the danger must be such as a reasonably prudent person would have anticipated as a natural and probable result.⁷⁷ Expressed otherwise, the well settled rule applicable to cases of this character is that to establish negligence it must be shown that the injury sustained is one that would probably flow from allowing the obstruction as it existed.⁷⁸

street is closed.” *Knepple v. Lauf-fer*, 182 Ky. 514, 206 S. W. 788.

⁷⁷ It is not enough to show that an accident did happen and such an accident was in the realm of possibility, but that a danger existed within the realm of probability. *Starkey v. Greenville*, 189 Mo. App. 352, 175 S. W. 314, 316, citing § 2767, p. 5656, vol. 6, ante.

Municipality permitted wire to be stretched between light poles for a banner, which by the effect of the wind slipped down the poles and injured one riding in the street. Whether city was negligent in not anticipating such result, held a jury question. *Kiple v. Clermont* (Ia. 1919), 174 N. W. 251.

⁷⁸ *Wilt v. Coughlin*, 176 Mo. App. 275, 161 S. W. 888.

Thus where a horse stepped on one end of an oak stick in a street thereby causing the other end to fly up and strike and penetrate the body resulting in death, there is no municipal liability. *Starkey v. Greenville*, 189 Mo. App. 352, 355, et seq., 175 S. W. 314, citing § 2726, vol. 6, ante.

Building operations—duty of city. If the city “omitted to provide safeguards which were reasonably necessary to protect the public from dangers occasioned by

building operations in immediate proximity to the streets, it could not be exempted from liability for the consequences of such omission merely because a particular accident resulting therefrom may have been different in nature or degree from those which might ordinarily result from such conditions. If it is the duty of the defendant to require the sidewalk in front of a building in process of erection to be guarded by barricades or otherwise, it is because of the general danger to pedestrians due to the probability that materials may fall into the street during the progress of the work, and not because of an apprehension as to some specific form or kind of injury which may be thus inflicted. The erection of an elevated wall immediately adjacent to a public street involves an element of hazard to persons using the sidewalk which may be readily anticipated and against which it seems reasonable that some protection should be afforded. Although ordinary care may be exercised in the performance of the work, allowance must be made for the occasional fall of fragments of the materials used in the construction. There is no certainty that such objects will be so limited in size and

§ 2768. Same—obstructions between driveway and sidewalk.⁷⁹**§ 2769. Openings, excavations, holes and the like.⁸⁰**

weight as to be incapable of causing injury, and they could not be prudently disregarded as a possible source of danger. The municipal duty of keeping the streets reasonably safe for public use could hardly be said to be properly fulfilled if elevated structures are permitted to be built along the thoroughfares without any provision being made for protecting persons on the street from the risk of harm to which they may be exposed by the building operations. The possibilities of injury from such a source are sufficiently apparent to call for some regulative action on the part of the municipality in regard to such conditions in order that it may be in a position to plead the full performance of its duty as against such a claim as the present. In *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664, L. R. A. 1915E, 1069, it was said to be incumbent upon a city, which grants a permit for the erection of a building adjacent to a street, to place barriers in order that the passage of persons on the sidewalks in front of the structure, might be prevented while the work was going on because of the danger from the falling of tools, materials or other obstructions. The principle that a municipal corporation which is invested with the power is consequently charged with the duty to make reasonable provisions for the safety of the public in the use of its streets has been fully

and frequently recognized by this court." *Hagerstown v. Crowl*, 128 Md. 556, 97 Atl. 544, 546.

⁷⁹ **Curb boxes** when in proper repair and when located in the outside line or that part of the sidewalk usually devoted to objects of like character, such as shade trees, hitching posts, stepping stones, telegraph poles and the like, do not constitute nuisances, or improper uses of the streets or walks and are not per se actionable obstructions, but they may become so by reason of their defective condition or situation therein. The general rule in such case is that the question presented is one of fact for the jury. *Corbin v. Huntington*, 81 W. Va. 154, 94 S. E. 38.

The obstruction was a wire netting placed on the side of the street. The netting was to protect a parking place and was next to the cement sidewalk. The injury occurred on a dark night during a storm. "The existence of the wire netting so close to the pathway was a menacing danger to traveling pedestrians—particularly so on dark and stormy nights. Moreover it had remained in this position for a period of time that rendered its presence a nuisance. * * * Under such circumstances, the cause was one for the jury and the evidence sustained the verdict." *Lund v. Seattle*, 99 Wash. 300, 169 Pac. 820.

⁸⁰ **Wagon** dropped into a depres-

§ 2770. Snow and ice.

Apart from statute, a much less stringent liability ex-

sion in the street, due to repairing. *Burton v. Kansas City*, 181 Mo. App. 427, 168 S. W. 889.

Plaintiff fell into sewer inlet in public street. *Trippensee v. Jefferson City*, 174 Mo. App. 727, 161 S. W. 303.

Plaintiff stepped on a catch basin which was defective and fell into the hole; held city liable. *Colton v. Kansas City*, 162 Mo. App. 429, 433, 145 S. W. 494; *Rickards v. Kansas City*, 181 Mo. App. 336, 168 S. W. 845.

Defective catch basin in public street. *Osborn v. Mt. Vernon*, 197 Ill. App. 267.

Defect in lid of coal vault extending into an alley. *Scheuch v. District of Columbia*, 44 App. D. C. 118.

A ditch in a street is a defect which may create municipal liability. *Ivey v. Birmingham*, 190 Ala. 196, 67 So. 506.

Pedestrian fell into ditch in a street. *Smith v. Marcelline* (Mo. App.), 198 S. W. 1116.

Unguarded excavation in middle of street may create liability. *Miller v. Duluth*, 134 Minn. 418, 159 N. W. 960.

Pedestrian fell on board covering over a street excavation. Liability, held a jury question. *Quirk v. Bradley Contracting Co.*, 161 N. Y. S. 296, 97 Misc. Rep. 368.

Uncovered ditch in street into which was emptied scalding water into which a child fell may create municipal liability. *Conway v. Kingston*, 169 N. C. 577, 86 S. E. 524.

Sewer trench caved in and injured boys at play in the street. *Barrett v. Princeton*, 135 Minn. 56, 160 N. W. 190.

Trench along the curb of a street in the springtime at breaking up season in northern climate, although ungarded, held not actionable negligence. *Dorgan v. St. Paul*, 138 Minn. 347, 165 N. W. 131.

Hole. *Pickens v. Kankakee*, 200 Ill. App. 547.

The mere existence of a hole in a street is not evidence of negligence, as one near the size of a barrel head and four inches deep in the deepest part. *Lalor v. New York*, 208 N. Y. 431, 102 N. E. 558, Ann. Cas. 1916E, 572, reversing 132 N. Y. S. 539, 147 App. Div. 649.

Passenger alighting from street car and stepping into a hole in the street, may create liability. *Covington v. Westbay*, 156 Ky. 839, 162 S. W. 91.

Plaintiff fell into a hole which was in the roadway of the street and was caused by an inadequate water intake the city had installed and had undertaken to maintain. Pedestrians, as stated by the court, had a right to cross the street at that crossing, or at any other place, and the presence of the pathway certainly proclaimed the fact that people were using the crossing. "The hole, concealed as it was by surrounding weeds, was a trap, a snare to the feet of the luckless traveler that happened to pass that way in the

ists with reference to snow on cross-walks,⁸¹ and roadways than upon a sidewalk.⁸² The duty of a municipality to keep its sidewalks free from snow and ice does not, in the absence of some express provision of statute, apply to the same extent to a cross-walk or crossing on a public street.⁸³

§ 2771. Moving objects.⁸⁴

§ 2772. Defects outside limits of street.

A pedestrian wandered from the walk and fell over a wall in the night time. It appeared the place was sufficiently lighted, and hence, he was denied recovery.⁸⁵

§ 2774. Openings or obstructions close to street.⁸⁶

The obligation to keep streets and sidewalks in proper repair is not confined to defects existing within the limits of the public way. Dangerous or unsafe ditches, excava-

night. * * * We may eliminate all idea of sidewalk space and of a pathway in a sidewalk space, for the safety of which it is contended the city would not be liable, and stand upon the fault of the city in constructing and maintaining an inadequate inlet in the street, and in suffering it to become a menace to the safety of people using a pathway over an improved part of the street." *Twedell v. St. Joseph*, 167 Mo. App. 547, 152 S. W. 432.

⁸¹ *Egan v. New York*, 161 N. Y. S. 849, 175 App. Div. 358.

⁸² *Williams v. New York*, 214 N. Y. 259, 108 N. E. 448, 450.

⁸³ *Dupont v. Port Chester*, 204 N. Y. 351, 97 N. E. 735, 39 L. R. A. (N. S.) 1167, Ann. Cas. 1913C, 1066, quoting with approval from *Brennan v. New York*, 114 N. Y. S. 578, 580, 130 App. Div. 267,

to the effect that the mere presence of snow and ice on a sidewalk is not enough to show that a city is negligent.

⁸⁴ See *Everley v. Adams*, 96 Kan. 305, 147 Pac. 1134, L. R. A. 1915E, 448, approving *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787.

⁸⁵ "Under the conditions shown to exist by the evidence we do not think that the municipal authorities could foresee that such an injury was likely to anyone reasonably attentive to his movements or that there was any departure from that standard of duty imposed by our decisions on our cities in the care and supervision of the streets." *Myers v. Ashville*, 165 N. C. 703, 81 S. E. 1060.

See § 2774, post.

⁸⁶ *O'Keefe v. Dietz*, 142 Minn. 445, 172 N. W. 696, citing § 2774, vol. 6, ante.

tions, walls or obstructions by the side thereof are included within the rule fixing municipal liability.⁸⁷ A city "must not create or suffer any pitfall within the traveled portion, or so near to it that a traveler upon the portion customarily used for travel may, although in the exercise of due care, fall therein."⁸⁸ Numerous decisions have held that unguarded excavations entirely outside the limits of the street, but so near thereto as to make travel thereon dangerous, may constitute municipal negligence.⁸⁹ So it has often been held that, injuries occurring an appreciable distance from the street, in the absence of visible boundary to the street line, and the traveler is thus deceived into the belief that he is within the street when in fact he is not, and is in this manner led into an unguarded trap, may create municipal liability.⁹⁰ Thus where a horse was being driven along a public street and became frightened at the sight of a locomotive within the limits of the highway and before the driver could gain control the horse plunged into an open, unguarded quarry near the highway causing injury of which complaint was made, it was held that there was municipal liability irrespective of the fact whether the quarry was an actionable defect in the highway.⁹¹ "Municipalities are not only held responsible for dan-

⁸⁷ Gate to yard obstructing sidewalk. *Campbell v. Chillicothe*, 239 Mo. 455, 461, 144 S. W. 408.

Defective catch basin at side of street, liable. *Rickards v. Kansas City*, 181 Mo. App. 336, 168 S. W. 845; *Colton v. Kansas City*, 162 Mo. App. 429, 433, 145 S. W. 494.

⁸⁸ *Miller v. Duluth*, 134 Minn. 418, 159 N. W. 960; *Neidhardt v. Minneapolis*, 112 Minn. 149, 127 N. W. 484, 29 L. R. A. (N. S.) 822.

⁸⁹ *Watson v. Duluth*, 128 Minn. 446, 151 N. W. 143; *Murphy v. St. Paul*, 130 Minn. 410, 153 N. W.

619; *Briglia v. St. Paul*, 134 Minn. 97, 158 N. W. 794.

Unguarded ditch along the side of a street maintained by the city will create liability if a child falls therein. *Stone v. Florence*, 94 S. C. 375, 78 S. E. 23.

⁹⁰ *Jewhurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 409; *Ray v. St. Paul*, 40 Minn. 458, 42 N. W. 297; *Coggswell v. Lexington*, 4 Cush. (Mass.) 307.

⁹¹ "While no serious complaint seems to be made because the jury found that the unguarded quarry hole was the proximate cause of the accident, it is evident that,

gerous conditions known to them, which are permitted to exist in portions of highways traveled by wayfarers, but they are also undoubtedly responsible for unsafe conditions known to them to exist in places where travelers passing along the highways would be apt to go, even though not within the traveled pathways," e. g., where a private walk joined a public sidewalk which was higher by between five and a half and six inches. In such case the municipality should reasonably anticipate that some person would likely be injured by such condition, and hence, negligence may be predicated upon allowing such condition to continue, after notice, even though not within the traveled space.⁹²

§ 2775. Overhanging and falling objects.

"The public right to the use of streets goes to the full width of the street and extends indefinitely upward and downward."⁹³ On the ground, therefore, of failure to exercise ordinary care to keep public ways in a reason-

if it were not, then the condition which caused the horse to shy was such cause, and for that, according to the verdict the appellant (city) was responsible. In that view, whether the horse reached the excavation while momentarily shying is immaterial. It is well settled that, if an ordinary gentle horse is startled by an actionable defect in a highway, and before its driver can by the exercise of ordinary care, restrain it, it dashes against some obstruction or into a hole or ditch, thereby causing injury to the driver or his property, the municipality in which such highway is situated is liable therefor, whether such obstruction, hole or ditch, constitutes an actionable defect in the highway or not. * * * The verdict of the jury made a clear

case for respondent under that rule, in connection with the decision of the court that the engine, conditioned as the evidence pretty clearly shows was an object naturally calculated to frighten horses of ordinary gentleness, which, as a matter of fact, it seems was so clear that there was no prejudicial error in not submitting the matter to the jury." *Meidenbauer v. Pewaukee*, 162 Wis. 326, 156 N. W. 144, 148, per Marshall, J.

⁹² *Egan v. Buffalo*, 173 N. Y. S. 474, 476, distinguishing certain New York cases, and declining to follow certain Maine and Massachusetts cases.

⁹³ *New Orleans v. Kaufman*, 138 La. 897, 70 So. 874 (citing § 2775, vol. 6, ante); *Nessen v. New Orleans*, 134 La. 462, 64 So. 286, 51 L. R. A. (N. S.) 324.

ably safe condition for travel, municipal negligence may be established, on the theory of a defect in the street, in action for damages due to injuries to travelers from awnings,⁹⁴ signs,⁹⁵ billboards,⁹⁶ poles,⁹⁷ electric wires,⁹⁸ or

⁹⁴ An awning fell on pedestrian who was waiting for a street car. *Leighton v. Dean*, 117 Me. 40, 102 Atl. 565.

Dangerous awning attached to private property extending over a public way may create municipal liability. Fell on pedestrian. *Hanrahan v. Chicago*, 289 Ill. 400, 124 N. E. 547, affirming 209 Ill. App. 630.

"The doctrine is well settled that the duty of a municipal corporation to use ordinary care to keep its streets in a reasonably safe condition requires it to take reasonable precautions against overhead structure, as well as those under foot. Hence, it is generally held that for an injury to a pedestrian received by reason of a defective awning or shed projecting over and across a sidewalk and supported on posts at the curbstone the city is liable, if it knew, or by the exercise of ordinary care could have known, of the defective condition in time to take reasonable precautions to avoid the injury, and failed to do so." *Gatewood v. Frankfort*, 170 Ky. 292, 185 S. W. 847.

⁹⁵ Sign suspended over sidewalk fell and injured pedestrian; and the one who erected and maintained it was held liable. *Hass v. Booth*, 182 Mich. 173, 148 N. W. 337.

Sign suspended over a street falling and striking pedestrian, etc., due to severe wind, city liable

unless wind unprecedented. *Purcell v. Stubblefield*, 41 Okl. 562, 139 Pac. 290.

Permitting a metallic sign attached to a building to be suspended over a sidewalk so low that a pedestrian struck his head against it and was injured. City's negligence, held a jury question. *Baillie v. Wallace*, 24 Idaho 706, 135 Pac. 850.

⁹⁶ Billboard erected on lot near sidewalk fell on pedestrian. City is required to exercise ordinary care as to security, etc., so pedestrians would not be injured. *Shippy v. Kansas City*, 254 Mo. 1, 162 S. W. 137.

Billboard insecurely attached to a fence or building by the side of the street by ordinary gust of wind was blown down and struck pedestrian. *Vandervere v. Kansas City*, 187 Mo. App. 297, 173 S. W. 696, 196 S. W. 785.

⁹⁷ Pole erected by a light company in a public street fell and killed a child. The pole was erected some fifteen or twenty years prior to the accident. It broke at or near the surface of the ground where it was much decayed, but the decay was from the inside, and there was little, if any, indication of decay on the surface of the pole. "It was undoubtedly in a dangerous condition; there being only a mere shell of sound wood on the outside. The question of the exercise of reasonable care in the supervision

other objects suspended over,⁹⁹ or near thereto, or falling into a street or sidewalk.¹

§ 2776. Same—falling of tree or limb.²

§ 2778. Same—falling objects caused by negligence of others.

The falling of timber from a building in course of construction near a sidewalk, injuring a pedestrian thereon, may render a street "out of repair," within the meaning of a statute.³

In a case of the falling of a banner stretched across a street, secured by a cable which gave way causing a brick

and inspection by the borough was, under the circumstances, for the jury." *Kost v. Ashland Borough*, 236 Pa. 164, 84 Atl. 691.

Flag pole on vacant lot fell on automobile passing, held city not liable. *Vossler v. De Smet*, 204 Ill. App. 292.

⁹⁸ Wire of city lighting system falling on a pedestrian and injuring him, creates municipal liability although the lighting system was maintained in a public capacity, on theory of failure to keep streets in condition, etc. *Goetzke v. Chicago*, 174 Ill. App. 446, 449, following *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345 (set out in note to § 2775, vol. 6, ante).

Pedestrian came in contact with electric wire which caused his death. *Monds v. Dunn*, 163 N. C. 108, 79 S. E. 303.

Contra. Defectively insulated electric street light owned and managed by the city was held not to be a defect in a public way under the provisions of the Alabama code. *Broom v. Cullmann* (Ala.), 73 So. 85.

⁹⁹ Railroad trestle. Municipality held jointly liable with a railroad company for insufficient clearance of a railroad trestle crossing the highway. *Brown v. Southern Ry. Co.*, 110 S. C. 243, 96 S. E. 701.

¹ Whether a city was negligent by omission in permitting a quantity of sheet steel, 600 pounds in weight, 30 inches in height and so nearly an upright position that the ordinary use of the sidewalk would tip it over onto pedestrians is for jury. Pedestrian while passing the steel sheets tipped over against him. Evidence that tipping was due to boys chasing a rat. Held, if jury should say that the sidewalk was not in a reasonably safe condition for public travel by reason of the position of the steel, the city would be liable, even though the act of the boys concurred with that of the city in causing the injury. *Brown v. St. John*, 187 Mich. 641, 154 N. W. 79.

² *Indianapolis v. Slider*, 56 Ind. App. 230, 105 N. E. 56.

³ *Johnson v. Huntington*, 82 W. Va, 458, 95 S. E. 1044.

from a building to fall, strike and injure a pedestrian in the street, liability was denied, it being held that the doctrine of *res ipsa loquitur* was not applicable to a municipal corporation.⁴

Injury to a pedestrian due to a billboard blown from private premises creates no municipal liability in the absence of notice to the city that the board was dangerous, etc.⁵

b. Driveway.

§ 2779. In general.

It is a well established rule that usual and ordinary slight defects in highways create no legal liability for accidents.⁶ What depressions and minor defects in a street will be sufficient to establish municipal negligence is governed entirely by the circumstances, the location of the street, the amount of travel thereon, and its condition with the defect.⁷ Clearly a municipality is not required to keep its streets free from ruts, and the mere fact that a wagon runs into a rut does not prove negligence. It must be shown that the rut rendered the street not reasonably safe for travelers exercising ordinary care and caution.⁸ Where one was jolted from a wagon in a public street and received injury from which he died, due to the fact that the front wheel of the wagon slid or dropped into a rut or depression in the pave-

⁴ DuBois Borough v. Pancoast, 218 Fed. 60, 133 C. C. A. 662.

⁵ Dahmer v. Meridian, 111 Miss. 208, 71 So. 321.

⁶ Horan v. Hastorf, 223 N. Y. 490, 120 N. E. 58; Terry v. Perry, 199 N. Y. 79, 82, 93 N. E. 91, 35 L. R. A. (N. S.) 666, 20 Ann. Cas. 796.

⁷ What depressions in a street are actionable. Ardmore v. Fowler (Ok.), 153 Pac. 1117, citing § 2779, vol. 6, ante.

Depression in roadway at the

approach of a bridge. Ruppert v. New York, 153 N. Y. S. 100, 90 Misc. Rep. 365.

Depression, resulting in accident to team of horses. Keen v. Mitchell, 37 S. D. 247, 157 N. W. 1049.

Projecting beam from bridge may create municipal liability. Levine v. Pittsburgh, 252 Pa. 181, 97 Atl. 392.

⁸ Morrill v. Kansas City (Mo. App.), 179 S. W. 759, 762.

ment, it was said that: "It requires something more than a slight depression or unevenness in the surface of a roadway to render the municipality liable."⁹

Permitting to exist a defect consisting of extraordinary slipperiness on the surface of the street due to oiling may create municipal liability, as where an automobile carefully driven skidded, could not be controlled and collided with a milk wagon and killed the driver.¹⁰

§ 2780. Openings, holes, excavations, etc.

Under the late decisions whether a hole or rut in the driveway of a street resulting in injury, will create municipal liability, depends upon the question whether it is a dangerous defect rendering travel on the way in the usual modes, with ordinary care, hazardous or unsafe.¹¹

⁹ *Backer v. Aspinwall Borough*, 255 Pa. 541, 100 Atl. 479.

"The rule is now firmly established in this state that municipalities are not to be held liable, as for negligence, by reason of slight depressions or differences of grade in the highway. This rule is supported by a great number of decisions, many of which are collated in *Terry v. Perry*, 199 N. Y. 79, 92 N. E. 91, 35 L. R. A. (N. S.) 666, 20 Ann. Cas. 796. The obvious reason for the rule is that to hold otherwise would subject municipalities to a burden beyond that which they are reasonably required to bear." *Faber v. New York*, 146 N. Y. S. 295, 161 App. Div. 203.

¹⁰ *Kelleher v. Newburyport*, 227 Mass. 462, 116 N. E. 806.

¹¹ A hole from one to three feet wide and from six to ten inches deep in the street near the side thereof may constitute negligence. *Faber v. New York*, 213 N. Y. 411, 107 N. E. 756.

Wheels of a wagon fell into a hole in the pavement throwing an occupant out and injuring him from which he died. *Hartray v. Chicago*, 197 Ill. App. 446.

Horse being driven in a street was frightened by the blowing of a whistle of a locomotive and bolted causing the wheel of the wagon to fall into a large hole or rut in the street. *Cohen v. Chicago*, 197 Ill. App. 377.

Horse ridden by plaintiff stepped into a hole or depression near a bridge, causing injury, held negligence question of fact. *Higginbottom v. Burnsville*, 113 Miss. 219, 74 So. 133.

Drainway 15 or 18 inches deep running across a street, partly covered by a bridge, in an unfrequented section which was being developed, held not negligence. *Godfrey v. Elizabeth City*, 173 N. C. 696, 91 S. E. 357.

Grating or iron cover over a catch basin in the center of a street was out of repair and by

§ 2781. Obstructions.¹²

reason of which one of the four wheels of a vehicle fell into the opening throwing the driver out and injuring him. Municipal liability may be established. *Newport v. Zimmerman*, 152 Ky. 582, 153 S. W. 969.

Injury due to a hole in an asphalt pavement some two or three feet long and from ten to eighteen inches wide which an automobile ran into which threw it from its course over the curb and across the sidewalk striking one who died from the injuries. Whether the pavement was sufficiently defective to render the city liable was held to be a question of fact. *Cone v. Detroit*, 191 Mich. 198, 157 N. W. 417.

A twelve year old boy was riding on horseback on a principal street when his horse stepped into a hole about six or eight inches wide, ten or twelve inches long and eighteen inches deep and stumbled and caused the death of the boy by throwing him or falling on him. The hole into which the horse stepped was in a culvert or wooden box running across the street for the purpose of carrying water from one side to the other, and which was a little under the surface of the street. Negligence of city, held a fact question. *Foster v. Tyron*, 169 N. C. 182, 85 S. E. 211.

Ditch in a street into which a wagon ran and jolted so driver fell out and was injured. Jury question. *Tubbs v. Berwick Borough*, 262 Pa. 203, 105 Atl. 57.

¹² Horse through fright at a pile of rubbish within a street ran

away, etc., held no municipal liability under the circumstances, as the rubbish was not an unlawful obstruction per se, as it was not permanent as it was deposited there for removal in an annual clean-up day. *Lyman v. Potsdam* (N. Y. 1920), 127 N. E. 312.

Automobile struck a fallen tree which obstructed a roadway in a park. *Rockett v. Philadelphia*, 256 Pa. 347, 100 Atl. 826.

Team ran into obstructions. *Gage v. Vienna*, 203 Ill. App. 156.

The injury occurred on a street which sloped towards the east at a considerable grade. The street had been graded and curbed and at intervals manholes had been placed at the sides of the street to take care of surface water. These manholes were covered with flagstones, some three feet long extending over the gutter from the curb to the graded surface of the street. As the driver turned aside from the center of the roadway in order to pass a team which he met his wagon wheels on the right hand side slipped into the gutter. At the time his horses were trotting and he continued to drive at a trot with his wheels in the gutter for a distance of about 75 feet until the front right wheel struck a flagstone extending across the gutter over one of the manholes. The theory of the case was that the city was negligent in permitting the flagstones to project over the curb line into the street and that this negligence was the proximate cause of the injury. The court held that the city was not required to maintain a street in

§ 2783. Objects frightening horses.¹³

When a team of horses become frightened by an object,—an oil spreader—driven by the municipality in a

condition for travel its entire width; that the gutter could not be considered as a defect. "The condition, which existed at the point in question, was one frequently found in the streets of all municipalities, at ordinary crossings, or where it is necessary to make provisions by which vehicles may cross the gutter and sidewalk to enter a driveway or stable, or warehouse. It is a usual thing to cover the gutter with a wooden, or iron or stone covering. Hardly a municipality in the state is without such arrangements. In the present case the purpose in covering the gutter was not to provide means of access for vehicles to the sidewalk, but it was intended to prevent passers-by from falling into the manhole. The result, however, in so far as the method of construction was concerned, was the same. It is also a common thing to place flagstones, or an iron or a wooden covering over gutters at street crossings. In either case, if a wagon, whose wheels are running in the gutter, drawn by horses at a trot, should come in contact with such an obstruction, the natural result will be to produce just such a jolt as occurred in the case now under consideration. Yet we do not think it can fairly be held that a municipality is guilty of negligence in maintaining a covering over a gutter for the purpose of providing means of access to a stable or driveway, or to afford conven-

ience for pedestrians." *Short v. Carbondale*, 249 Pa. 564, 95 Atl. 254.

¹³ See *Hurley v. Boston & M. R. R.*, 228 Mass. 365, 117 N. E. 591.

No recovery for injury can be had where the object is one necessarily used by the municipality, or some one acting under its authority, in improving the street, and is placed on the side of the street while improving it, unless allowed to remain there an unreasonable time. "Steam rollers are necessary and in common use in macadamizing streets and roads, and a city or town may lawfully use them in constructing or repairing its streets, and in the absence of negligence in their management, it is not liable in damages for injuries resulting from horses becoming frightened at them, when in use, or when temporarily left in appropriate places on the street when not in actual use while the work of construction or improving is in progress." *Tanner v. Culpeper Construction Co.*, 177 Va. 154, 83 S. E. 1052, 1054, citing and setting out the substance, with approval, of § 2783, vol. 6, ante.

Gasoline engine was being used close to an alley by a contractor engaged in the construction of a building, when a farmer drove his team in the alley and the team became frightened, got away, hence injury. City, held not liable. See *Wald v. Schmidt*, 127 Minn. 375, 149 N. W. 655.

Negligence charged: Permitting

street, negligence may be predicated upon the failure of the driver thereof to stop, when requested, and after he saw and knew, or by the exercise of ordinary care could have seen and known, that the horses were frightened in time to have stopped and thereby avoided the runaway and injury.¹⁴

c. *Sidewalks.*

§ 2785. Particular defects in general—holes, depressions, irregularities.

To recover on account of a defective sidewalk these elemental facts must be established: First, that while using the sidewalk properly the injury was suffered by reason of the defect, e. g., plaintiff fell into an excavation, depression or hole, or stumbled and fell because of the defect, that is, uneven surface or obstruction; second, that the sidewalk was not reasonably safe on account of the defect, with specifications; third, that the defect had existed a sufficient length of time for the municipal corporation, in the exercise of reasonable care, to have known of its existence in time to have repaired it had reasonable diligence been exercised.¹⁵

Slight or minor defects in sidewalks resulting in injury, generally speaking, do not establish municipal negligence.¹⁶ Such minor defects may include slight depres-

piles of rock to be placed on each side of a high narrow grade, causing horse attached to a buggy being driven in the street to become frightened and back the buggy over the embankment, thus producing the injury. Verdict for plaintiff, sustained. *Dow v. Nora Springs* (Iowa), 160 N. W. 897.

¹⁴ "The oil when spread is heated so that it will run freely. It emits a pungent smell, and when it strikes the cold street some

steam or vapor arises." *Hoover v. Fulton*, 177 Mo. App. 95, 98, 163 S. W. 292.

¹⁵ *Barnes v. St. Joseph*, 151 Mo. App. 523, 528, 132 S. W. 318.

¹⁶ Slight difference in grade of sidewalk where one stubbed her toe and fell does not show such defect as to render a city liable. *Engel v. New York*, 146 N. Y. S. 307.

A sidewalk elevated some four inches above the surface of the

sions,¹⁷ inconsequential irregularities and inequalities, rendering the walk not smooth,¹⁸ inequalities at junction of concrete blocks of which the walk was composed,¹⁹ and small holes.²⁰ Pavements may follow the surface of the natural grade with its elevations and depressions. Pavements on a grade may be built to conform to the gen-

ground at the edge of the walk is not unsafe. *Elsmere v. Tanner*, 158 Ky. 681, 166 S. W. 220.

A small break in a cement sidewalk over which a pedestrian tripped will not render the city liable. A city cannot be held negligent for suffering to remain in a sidewalk small and inconsequential defects. A city is not an insurer of the personal safety of everyone who uses its public walks. It owes no duty to keep them in such repair that accidents cannot possibly happen upon them. *Grass v. Seattle*, 100 Wash. 542, 171 Pac. 533.

Fact that sidewalk is some four or five feet higher than the street grade, does not show municipal negligence. *Rahm v. Vicksburg*, 255 Fed. (U. S. C. C. A.) 541.

Sinking of granitoid block; whether city was negligent, held jury question. *Lundahl v. Kansas City* (Mo. App. 1919), 209 S. W. 564.

¹⁷ Not perfect; free from depressions and elevations. *Welsh v. Des Moines* (Ia. 1919), 170 N. W. 369.

Ordinarily not liable for slight depressions. Of course, if of such a character as likely to cause injury, that fact, is to be considered. *Gibbs v. Girard*, 32 Ohio Cir. Ct. R. 422.

A depression two and one-fourth inches deep or less near the center

of the sidewalk, held did not establish negligence on the part of the city. *Vanderborg v. New York*, 143 N. Y. S. 26, 158 App. Div. 297.

¹⁸ *Griffith v. Denver*, 55 Colo. 37, 132 Pac. 57.

Walks presenting a smooth surface for pedestrians, although desirable, is not exacted. *Karolinsky v. Chicago*, 163 Ill. App. 33.

Absolutely perfect sidewalks need not be provided and maintained. "It is a matter of common knowledge that no sidewalk is perfect, and that inequalities exist in the surface of the sidewalks of every city. The defects are of infinite variety. Depressions in concrete or stone walks are common. Absolute safety is not required. * * * A perfect level cannot be required. Slight inequalities cannot well be avoided." *Johnson v. Ames*, 181 Iowa 65, 162 N. W. 858, 860, approving *Bigelow v. Kalamazoo*, 97 Mich. 121, 56 N. W. 339, and *Keen v. Mitchell*, 37 S. D. 247, 157 N. W. 1049 L. R. A. 1916F, 704.

Inequalities, etc., slight obstructions, etc., no liability. *Daly v. Trinity Church*, 176 N. Y. S. 734.

¹⁹ *Van Der Blomen v. Milwaukee*, 166 Wis. 168, 164 N. W. 844.

²⁰ *Annapolis v. Stallings*, 125 Md. 343, 93 Atl. 974; *Barnes v. St. Joseph*, 151 Mo. App. 523, 528, 132 S. W. 318.

eral surface of the ground, or they may be built on an artificial grade, without by reason of this fact alone subjecting a municipality to liability to persons who may slip or fall on account of the grade, because the law does not impose upon cities or towns the duty of building or maintaining its streets on a level surface and keeping the surface of the street perfect. Steps may be placed in a pavement to overcome the grade.²¹

On the other hand, municipal liability may arise where pedestrians suffer injuries from dangerous or unsafe defects in sidewalks, including considerable difference in levels at joining of parts of walk,²² abrupt depressions,²³ depressions in which water was allowed to accumulate and freeze,²⁴ low places of considerable depth and extent,²⁵ or holes,²⁶ defective²⁷ or missing boards in a plank

²¹ *Lebanon v. Graves*, 178 Ky. 749, 199 S. W. 1064.

²² Pedestrian caught her foot upon an irregularity of the sidewalk and was thrown to the ground. The irregularity was occasioned through a failure to have a concrete sidewalk laid at the same level that was a flag stone walk to which it joined. The difference in the level at the place of accident was some three and one-half inches. "It is urged that the defect shown in the walk was so slight and trivial a character as to be wholly insufficient to support a recovery. It is true that there have been many decisions of our courts denying recovery upon the trivial character of a defect in the street complained of, and in some of such, by actual measurement, the defect seems to have been even greater than in this case. * * * But in this class of litigation, each case must stand upon its own particular facts; and it appearing in this

action that the accident happened in the evening, when it was dark and rainy, and when the place of the accident was poorly lighted by reason of the failure of an electric light located nearby, we are not justified in holding that the verdict is against the weight of the evidence upon the issue of the negligence of the defendant." *Merwin v. Utica*, 158 N. Y. S. 257, 172 App. Div. 51.

²³ *Key West v. Baldwin*, 69 Fla. 136, 67 So. 808.

²⁴ Depression in sidewalk at which a pedestrian fell in which water was allowed to accumulate and freeze, may create municipal liability. *Dracass v. Chicago*, 193 Ill. App. 75.

²⁵ Depression or drop in curb of sidewalk. *Kuchler v. Milwaukee*, 165 Wis. 320, 162 N. W. 315.

A hole or depression between rails of a street car track some two and one-fourth inches deep was stepped into by a pedestrian; whether there was negligence on

the part of the city in suffering the hole to remain is a fact question. *Louisville v. Haugh*, 157 Ky. 643, 163 S. W. 1101.

Pedestrian stepping into a depression in front of a catch basin, question of negligent construction is one of fact. *Nelson v. Kansas City*, 170 Mo. App. 542, 157 S. W. 94.

Irregularity or depression in the surface of a sidewalk due to the scaling off of the cement crust covering a space about two feet long, six inches wide and one-half inch deep. The hole had existed for several years. The negligence was a question of fact. Liability depends on whether such injury such as complained of should have been anticipated by the exercise of reasonable prudence, as the result of the defect in question. "Each case turns to a large extent upon its own peculiar features." *Evans v. Hutchinson*, 99 Kan. 477, 162 Pac. 342.

"It is true cities are not required to make their sidewalks level, and without incline or grade, regardless of the topography. And where a sidewalk is not negligently constructed, nor allowed to become unsafe or dangerous, an injury caused by a mere slant in the walk is not actionable. Neither is a city liable for a stepoff rendered necessary in the construction of a walk, and which is maintained in a reasonably and ordinarily safe condition, and the plan of construction is not manifestly unsafe." But a pedestrian injured by stepping into a low place in the sidewalk which was not

slight, and which low place was the result of a manifest defect in the walk it will afford a basis for liability. It appears that the earth over the walk had washed away allowing the walk to sink so as to leave a depression or sunken place. *Price v. Maryville*, 174 Mo. App. 698, 161 S. W. 295.

²⁶*Swenson v. Aurora*, 196 Ill. App. 83, 88.

Hole in sidewalk due to removal of water meter into which pedestrian stepped and was injured. Negligence of city a fact question. *Sehorn v. Charlotte*, 171 N. C. 540, 88 S. E. 782.

Hole in pavement of concrete slab one and one-half inches deep and ten inches square into which pedestrian fell which had existed some time prior to accident, creates municipal liability. *Ponti v. Philadelphia*, 63 Pa. Super. Ct. 428.

Pedestrian stepped in a hole on a cement sidewalk, 16 to 18 inches in diameter and knee deep, the hole being due to the removal by the city of a water meter. The question of the city's negligence was held to be one of fact. *Sehorn v. Charlotte*, 171 N. C. 540, 88 S. E. 782.

²⁷Defective board in walk. *Wren v. Seattle*, 100 Wash. 67, 170 Pac. 342.

Defective plank giving way. *Willis v. Browning*, 179 Mo. App. 233, 166 S. W. 1070.

Pedestrian stepped on a board which was rotten and it broke under his weight and his foot was caught and went through the bottom of a drain under the crossing. Liability sustained. *Willis v.*

walk,²⁸ or a misplaced board therein which tilted and tripped a pedestrian,²⁹ a misplaced brick in a brick pavement,³⁰ a sunken place in a granitoid walk,³¹ a cement block lifted up out of place at one end so that such end projected above adjoining blocks,³² a defective support resulting in the sidewalk giving way,³³ defective covering or lid of coal hole,³⁴ or of a cellar door,³⁵ or of an iron³⁶

Browning, 179 Mo. App. 233, 166 S. W. 1070, 161 Mo. App. 461, 143 S. W. 516.

Defective plank sidewalk. Evidence that it was in fact in bad or unsafe repair and condition, because (1) a plank therein was broken, or (2) the planks therein were loose and unfastened, sustains the allegation of negligence. Weber v. Chicago, 201 Ill. App. 564.

²⁸ A pedestrian tripped and fell while walking on a sidewalk of plank where a number of the boards had been removed, and the city was held negligent. Radford v. Brooks (Va. 1919), 100 S. E. 664.

²⁹ Diel v. Ferguson, 158 Mo. App. 286, 138 S. W. 545; Howard v. New Madrid, 148 Mo. App. 57, 127 S. W. 630.

³⁰ A depression caused by a misplaced brick in a brick paved sidewalk in the residence portion of the city does not in itself show such a defect as creates municipal liability. Meridian v. Crook, 109 Miss. 700, 69 So. 182.

³¹ Stepping on and turning foot on sunken block in granitoid sidewalk under the doorway of an abutting shop. Willis v. St. Joseph, 184 Mo. App. 428, 171 S. W. 27.

³² One of the cement blocks or

squares was lifted up out of its place at one end so that the end in question projected above the other blocks adjoining it to the extent of 2 $\frac{3}{8}$ inches on one side of the walk and about 2 inches on the other. The walk had been in that condition for several years. Pedestrian tripped on block, etc. It was dark but the walk could be seen as electric light was burning. Negligence of city held a fact question. Court could not say as a matter of law city was not negligent. Shugren v. Salt Lake City, 48 Utah 320, 159 Pac. 530, reviewing cases.

³³ Sidewalk gave way because of defective support, while the plaintiff was sitting on a wheelbarrow thereon with others. Verdict against municipality was sustained. Mills v. Ogawaka, 200 Ill. App. 119.

³⁴ Pedestrian stepped on a board over a coal hole on the sidewalk which gave way. City's negligence a question of fact. Bond v. Sedalia (Mo. App.), 194 S. W. 740.

Pedestrian stepped upon the lid of a coal hole which tilted and he received injuries. Posey v. National Bank, 243 Pa. 568, 90 Atl. 363.

³⁵ Tripping on hinge of a cellar door in the sidewalk. O'Donnell

or a trap door.³⁷ The liability in each instance, depending of course, on the particular circumstances shown to exist at the time of the injury.

A sidewalk may become dangerous or unsafe for travelers from smoothness or slipperiness, due to its manner of construction or on account of use,³⁸ or weather conditions,³⁹ or the dropping thereon of such refuse as vegetable matter, banana peelings and like substances,⁴⁰

v. Hannibal, 144 Mo. App. 155, 128 S. W. 819.

³⁶ Pedestrian tripped over a ring in an iron door. Negligence held a fact question. *Cannon v. Worcester*, 225 Mass. 270, 114 N. E. 306.

³⁷ *Roe v. Kansas City*, 100 Mo. App. 190, 13 S. W. 404.

³⁸ *Tudor v. Louisville*, 172 Ky. 429, 189 S. W. 456, 460.

Liability may arise for permitting sidewalks to become so "extremely slick as to be highly dangerous to pedestrians." *Berry v. Sedalia*, 201 Mo. App. 436, 212 S. W. 34, 36.

Sidewalk was glazed and so highly polished as to be slick and slippery. Such condition may create municipal liability resting upon the inherent slippery nature of the walk, which sidewalk may become inherently dangerous. *Schmidt v. Newport*, 184 Ky. 342, 212 S. W. 113, 115.

³⁹ Liability denied where pedestrian slipped and fell on wet leaves which had accumulated on the sidewalk during the autumn season. "Here no fact was shown indicating negligence by the village, except that there were leaves on the sidewalk which were made wet by a rainstorm on the day of the accident. In the fall of the year, the time for storms and winds, every shaded street may

become more or less covered with leaves. Such a condition of its streets cannot be prevented. A village is not liable for an injury from wet leaves, where the sidewalk had no defect and nothing indicating negligence appeared, beyond a walk made slippery by leaves moistened by one or two hours of rain." *Osborne v. North Tarrytown*, 167 N. Y. S. 681, 180 App. Div. 224.

⁴⁰ Injuries received as a result of slipping on a banana peeling and thereby falling to the sidewalk. The charge was that the city suffered or allowed the sidewalk to be and remain with such refuse as vegetable matter, banana peelings and like substances upon it for an unreasonable length of time prior to the injury, and that the city had notice of such condition; that the city permitted to be maintained on the sidewalk nuisances, namely, the daily and habitual accumulation upon said sidewalk of obstructions, such as discarded fruit peels, banana peels, decayed vegetable matter and other loose substances, to the great danger of those using the sidewalk as a walk way, which danger was increased by reason of the fact that the surface of the sidewalk was of concrete material smooth and easily made slippery by the accumulation

and in such case municipal liability, of course, must be determined from the controlling circumstances.⁴¹

Finally, municipal negligence may be established by any defect which renders the sidewalk dangerous or unsafe for use by travelers exercising ordinary care for their own safety.⁴²

of such substances. Moreover, the city permitted the sidewalk to be unlawfully used, and occupied by persons who were displaying and selling bananas, apples, oranges and other fruits, as well as vegetables, among other things on the sidewalk at the place in question, and that as a natural outcome and proximate result of the use of the walk, which is alleged to be a nuisance, there was a daily, regular and habitual accumulation upon the walk of obstructions such as discarded fruit peels, banana peelings, rinds, decayed vegetable matter and other loose substances to the great danger of those using the sidewalk as a walk way, increased because of the fact that the sidewalk was made of concrete material and its surface was therefore smooth. The court in overruling a demurrer said: "We will not be understood as holding that a person who receives injury by slipping and falling over a casual banana peeling may recover damages of the municipality. There may be, there is, danger to the pedestrian in a single banana peeling or other like substances, but municipal authorities cannot be expected to know actually the place of such trivial, casual, isolated and impermanent things, nor can they be charged with knowledge by construction. If, however, the corporation for a long time

has permitted at a certain place the daily and habitual accumulation of fruit peelings, banana peelings, decayed vegetable matter and other loose substances to the great danger of those using the sidewalk as a walk way, as the counts of the complaint allege, it seems to be satisfactorily established in reason and authority, that it should be held liable to a pedestrian who is injured thereby while in the exercise of due care and prudence." *Bessemer v. Whaley*, 187 Ala. 525, 65 So. 542, reversing 8 Ala. App. 523, 62 So. 473.

⁴¹ Pedestrian slipped and fell. Defect alleged was slippery surface. City, to show that walk was reasonably safe may present testimony of witness who had used the walk to effect that they walked over it without any trouble. *Kansier v. Billings*, 56 Mont. 250, 184 Pac. 630.

Sidewalk uneven, smooth, sloped with the pavement about two inches to the foot. It was conceded that the surface of the pavement at the point in question was so smooth and slippery as to cause many persons walking on it to fall and slip and that this condition had existed some three years prior to the accident. *Lebanon v. Graves*, 178 Ky. 749, 199 S. W. 1064.

⁴² Stump in sidewalk. *Alexander*

§ 2786. Steps or abrupt slopes.⁴³

§ 2787. Obstructions.

An obstruction in a sidewalk causing an injury, to be actionable must be such a one as to make the walk at the point of the accident dangerous or unsafe for a pedestrian using it with due care for his own protection. If the obstruction is of that character municipal respon-

v. St. Joseph, 170 Mo. App. 376, 379, 156 S. W. 729.

Cellar door projecting upon the sidewalk, actionable. *Bannister v. St. Paul*, 131 Minn. 448, 155 N. W. 627.

Space between flagstones to remain for a considerable time. Whether negligence, held jury question. *Fitch v. Hartford*, 92 Conn. 365, 102 Atl. 768.

Pedestrian fell on sidewalk maintained in the form of a stairway on a public street. It consisted of a stairway with a rail and banister on one side for the protection of pedestrians. Liability established. *Kingery v. Jefferson City* (Mo. App.) 190 S. W. 976.

Notice. Pedestrian tripped over a broken guy wire on a sidewalk. The wire was a part of the equipment of the electric plant of the city. The break occurred some quarter of an hour prior to the accident. Liability was denied. *Green v. Reedsburg*, 162 Wis. 101, 155 N. W. 938.

Statute construed. The removal of a portion of a railing along a sidewalk on a hill, which had been constructed by the city "as an assistance in making the ascent or descent of the street in times of snow or ice," and not in the

performance of a legal duty imposed by statute, did not create any municipal liability since it is plain that its removal did not constitute a defect in the way under the Massachusetts statute. *Neilson v. Worcester*, 219 Mass. 88, 106 N. E. 579.

⁴³ Sidewalk sloped upon which pedestrian slipped and fell. Held no liability. *Hesse v. New York*, 173 N. Y. S. 827.

Pedestrian fell on sloping sidewalk upon which were placed cleats at intervals which were in part filled in by tar pitch, which made the cleats in a measure useless. *Hanson v. Seattle* (Wash. 1919), 185 Pac. 581.

Abrupt projection; jury question. *Montgomery v. Supple* (Ala. App.), 80 So. 139.

Defect in one of the stones on stone steps extending from one street to another, which when the pedestrian stepped on it, it tilted, showing that the step was loose. "It is immaterial for the purposes of this case whether the negligence consisted in some inherent defect of construction, or whether it was failure to keep the steps in proper repair; the salient fact is that it was loose, that it tilted and caused the injury." *Frankfort v. Kirdy*, 156 Ky. 741, 161 S. W. 1115.

sibility follows upon competent proof of the essential elements of liability.⁴⁴ In determining whether there is municipal negligence in cases of this kind the practical and

⁴⁴ **Water pipe** extending above a walkway, held obstruction; pedestrian tripping over it at night. *Sunapi v. Lee* (R. I. 1918), 102 Atl. 961.

Pedestrian caught her foot under the cap of a pipe of the waterworks which projected above the sidewalk. The city was held to have placed it there in the exercise of its proprietary power, and it was an obstruction and therefore there was liability. *Powers v. Mechanicsville*, 148 N. Y. S. 452, 163 App. Div. 138.

Metallic curb box on sidewalk placed by city officers. A pedestrian tripped over the same. Held, to be a basis for negligence of city. *Elrod v. Franklin*, 140 Tenn. 228, 204 S. W. 298.

Garbage can on sidewalk is an actionable obstruction. It had remained there three days. The city cannot escape liability on the ground that removing garbage was a governmental function. The negligence is ignoring the duty to keep its public ways in a reasonably safe condition. *Louisville v. Hans*, 167 Ky. 160, 180 S. W. 65.

Stakes and wires on sidewalk constitute an obstruction. They had been placed by property owners. *Birmingham v. McKinnon* (Ala.), 75 So. 487.

Coal sacks. Pedestrian stumbled and fell over some sacks of coal which had been placed on the sidewalk by the city. There was no warning or barriers or ropes of any kind guarding the same. City,

held liable. *Atlanta v. Thurman*, 19 Ga. App. 531, 91 S. E. 887.

Rope stretched across the sidewalk for the purpose of quarantining houses during an epidemic of scarlet fever. Of course, no damages can be recovered against a city arising from the placing of a quarantine, for the reason that the acts of the health officer are public and governmental and are not corporate in character. But the city is charged with a duty of exercising reasonable care to keep its sidewalks reasonably safe for public travel. The liability of the city, if any, is not by reason of the placing of the ropes, but it is by reason of its negligence in failing to warn pedestrians of the dangerous situation created by the sagging rope. *Sheets v. McCook*, 95 Neb. 139, 145 N. W. 252.

Wire rope strung on posts along the outer edge of the sidewalk placed by direction of the municipal authorities. Held, it constituted an unauthorized and dangerous obstruction to public travel. *Nessen v. New Orleans*, 134 La. 455, 64 So. 286, 288.

A water pipe placed across the sidewalk an inch or more in diameter connecting with a street, and an inch or more above the walk may be negligence. Such pipe in the night time, especially where it is shaded, may not be observed by a pedestrian. "It is clearly negligence for the city to place such an obstruction on a sidewalk

just solution of the issues is, first, to know the precise circumstances in the given controversy and, second, to give a fair answer to the question, did the obstruction involved render the public way at the place where the injury occurred dangerous or unsafe for travel in the proper manner? The difficulty, of course, is in the application of the general rule to the facts of the particular case. As the facts of the numerous cases of this kind vary so widely, precedents which fit precisely cannot always be readily obtained.

Obstructions which do not render the sidewalk obviously dangerous or unsafe present municipal negligence as a question of fact, and a large majority of the decided cases are of this character.⁴⁵ The maintenance by a

without protecting it at night by a light, or in some other way." *Blackwell v. Seattle*, 97 Wash. 679, 167 Pac. 53.

Bricks and lumber. A pedestrian encountered an obstruction and fell. The surface of the sidewalk at the point was uneven by reason of loose brick and pieces of lumber on the same and the opposite sidewalk was also obstructed by brick and building material. The place was not well lighted. The facts were held to permit the inference of culpable negligence on the part of the town in the care and supervision of the streets. *Darden v. Plymouth*, 166 N. C. 492, 82 S. E. 829.

Planks. Municipal liability may arise where a pedestrian exercising due care stumbles over planks and cross pieces placed upon a sidewalk by a contractor who was wrecking an adjacent building.

"A city is liable for injuries caused by dangerous obstructions on its walks and for failure to construct and maintain its walks in accordance with its plan of con-

struction." *Stanley v. Chicago*, 177 Ill. App. 245, 249.

Bananna peel. Liability due to a pedestrian stepping on a banana peel on a busy sidewalk, denied. *Boney v. Dublin*, 145 Ga. 339, 89 S. E. 197.

Placing a hose in a proper manner across a sidewalk by a city to convey water from a hydrant to a place where concrete was being prepared, in order to pave another street is not negligence. *Cutshall v. Keokuk* (Ia. 1918), 169 N. W. 677.

Permitting an erection, as a housing, on a sidewalk by an abutting property owner during building operations without formal authorization by the legislative body, is not an unlawful use. Hence, the city is not liable for the death of a boy run over in the street by an automobile recklessly driven because the boy was compelled to take the street on account of the sidewalk obstruction. *Jones v. Ft. Dodge* (Ia. 1919), 171 N. W. 16.

⁴⁵ **Stump**, five or six inches in diameter and extending three or

municipality of a waste paper box as a receptacle for

four inches above the surface of the sidewalk. *Alexander v. St. Joseph*, 170 Mo. App. 376, 379, 156 S. W. 729.

Root of a tree projecting over the sidewalk. *Lancaster v. Columbia*, 104 S. C. 228, 88 S. E. 463.

Pedestrian stumbled over projecting tree root on the sidewalk, eight inches above the sidewalk level, which had an opening like a horseshoe in which his foot was caught. The pedestrian was 71 years of age and the night was dark and rainy. *Richmond v. McCormack*, 120 Va. 552, 91 S. E. 767, 770.

Hose. Pedestrian fell over hose on a sidewalk placed there by city employees engaged in flushing a sewer. City, held not liable on ground that the act was governmental. *Spragne v. St. Louis*, 251 Mo. 624, 158 S. W. 16.

Bricks on sidewalk, remaining for a year. *Proctor v. Poplar Bluffs* (Mo. App.), 184 S. W. 123.

Broken cover of manhole in sidewalk upon which pedestrian stepped. Negligence a fact question. *Covington v. Rosenberg*, 177 Ky. 411, 197 S. W. 786.

Defective cap of a water meter. *Atlanta v. Hampton*, 139 Ga. 389, 77 S. E. 393.

Whether a curb box located behind a water plug standing on the same alignment with reference to the curb and obstructing it until one was almost in the act of stepping thereon is a nuisance, per se, held to be a question of fact in a particular case. *Courbin v. Huntington*, 81 W. Va. 154, 94 S. E. 38.

Iron cover known as a water

shut off box in the sidewalk over which pedestrian tripped. The sidewalk was of hard gravel, the top of the shut-off box projecting out in the form of a lip about one-sixteenth of an inch in a half round shape, and was from one and one-fourth to two inches above the level of the sidewalk. Whether such a condition was an obstruction to travel, rendering the sidewalk defective, was to be for the jury. *Thomas v. Winthrop*, 222 Mass. 456, 111 N. E. 173.

Water gate over which pedestrian stumbled in a cement sidewalk which projected above the sidewalk about two inches and was within one foot of the curb and above six feet from the other side of the walk. This water gate had been in the same position for some fifteen years. "It merely appears that this obstruction existed apparently for the private purposes of the abutting owners, and that the street was a much used highway; and the municipal authorities may be held to be liable for permitting such an obstruction for private purposes, where they would not be liable if the obstruction was shown to exist as a necessary part of some public utility." The court declined to disturb the verdict of the jury. *Conley v. Hudson Falls*, 147 N. Y. S. 567, 162 App. Div. 234.

"The wire netting was placed in the west side park flush with the cement sidewalk. Its existence so close to the pathway was a menacing danger to traveling pedestrians,—particularly so on dark and stormy nights. More-

trash and waste paper and the removal of the contents thereof is a duty connected with the preservation of the public health and is therefore a governmental function. But when the top or cover of such box was left open so as to project it over the sidewalk, and render such way dangerous or unsafe, and injuries result therefrom to a pedestrian, the ministerial duty of exercising ordinary care of keeping the sidewalk free from obstructions, was thereby violated, and the city is liable.⁴⁶

§ 2788. Excavations and openings.⁴⁷

“The authorities are practically unanimous to the effect that an excavation in a public sidewalk is intrin-

over, it had remained in this position for a period of time that rendered its presence a nuisance. The record shows that plaintiff was using the sidewalk in the ordinary manner. Under such circumstances the cause was one for the jury.” *Lund v. Seattle*, 99 Wash. 300, 169 Pac. 820.

⁴⁶ *Savannah v. Jones* (Ga. App.), 99 S. E. 469.

⁴⁷ *Macon v. Smith*, 14 Ga. App. 703, 82 S. E. 162.

Manhole in sidewalk, particular defect. *Covington v. Rosenberg*, 177 Ky. 411, 197 S. W. 786.

Pedestrian stepped on cover of manhole in a sidewalk which tipped, threw her on the sidewalk, causing injuries. The evidence tended to show that the cover was warped and did not fit and was easily displaced when trod upon, and that such condition had existed for some time from which the jury might have found that it would have become known to the municipality by reasonably careful inspection. *District of Columbia v. Pierce*, 44 App. D. C. 126, 140.

Opening in sidewalk, e. g., entrance to cellar. City liable. *De haven v. Danville Gaslight Co.*, 150 Ky. 241, 150 S. W. 322.

Elevator opening in sidewalk unguarded into which pedestrian fell. *Bosler Hotel Co. v. Speed*, 167 Ky. 800, 181 S. W. 645.

Coal hole open in sidewalk. *Cole v. Durham*, 176 N. C. 289, 97 S. E. 33.

Pedestrian fell in a coal hole in the sidewalk. *Hebenheimer v. St. Louis*, 269 Mo. 92, 189 S. W. 1180; *Sands v. Kansas City* (Mo. App.), 202 S. W. 294.

Sink hole was so close to an unguarded sidewalk as to constitute negligence. Heavy rain fell the day a seven year old boy fell into hole. Held, permitting the sink hole so close to an unguarded sidewalk, the insecurity of the sidewalk, and the absence of a rail or guard on the sidewalk at the place, all being of sufficient long standing to impart notice to the city, were all acts of negligence. *Benton v. St. Louis*, 248 Mo. 98, 108, 154 S. W. 473.

sically dangerous, and is a nuisance; that one who caused it to be made, equally with the one who makes it, owes the absolute duty to protect the public from injury that may result therefrom; and that the one who causes it to be made cannot escape liability for such injury by showing that the one who has made it was engaged so to do as an independent contractor.”⁴⁸

§ 2789. Ice and snow.⁴⁹

The uniform rule, well established, that municipal liability due to injuries on sidewalks resulting from snow and ice is based alone on negligence, is constantly applied by the late decisions.⁵⁰ Natural accumulation of snow

⁴⁸ *Burke v. Werlein*, 143 La. 788, 79 So. 405, per Monroe, C. J.

The pavement had been dug up to lay a pipe and the earth had been replaced but the bricks had not been relaid and the ground had apparently sunk. The sidewalk had been in this condition for several weeks. A pedestrian was injured thereon. Evidence sufficient to warrant a finding of negligence. *Vannort v. Chestertown*, 132 Md. 685, 104 Atl. 113.

Inspection. Excavation under sidewalk made by abutter, city is under obligation to inspect that part of the supporting structure, underneath the sidewalk, and to take notice of any defect not apparent at or from the surface of the sidewalk. *Sherwin v. Aurora*, 257 Ill. 458, 100 N. E. 938, affirming 168 Ill. App. 320.

⁴⁹ *Connecticut. Carl v. New Haven* (Conn. 1919), 107 Atl. 502.

Iowa. Gregg v. Springville (Ia. 1919), 174 N. W. 23; *Burns v. Waterloo* (Ia. 1919), 173 N. W. 16; *Rose v. Ft. Dodge* (Ia.), 155 N.

W. 170; *Griffin v. Marion*, 163 Ia. 435, 144 N. W. 1011.

Kentucky. Varney v. Covington, 155 Ky. 662, 160 S. W. 173; *Olson v. St. Paul* (Minn.), 170 N. W. 586.

Minnesota. Genereau v. Duluth, 131 Minn. 92, 154 N. W. 664; *Gist v. St. Joseph* (Mo. App. 1920), 220 S. W. 722.

Missouri. Fogg v. Kansas City, 187 Mo. App. 252, 173 S. W. 712; *Kelley v. St. Joseph*, 170 Mo. App. 358, 156 S. W. 804.

New York. Ryan v. Schenectady, 154 N. Y. S. 890, 91 Misc. Rep. 296; *Meyers v. Bacon*, 178 N. Y. S. 294.

North Dakota. Jackson v. Grand Forks, 24 N. D. 601, 140 N. W. 718.

Pennsylvania. Llewellyn v. Wilkesbarre, 254 Pa. 196, 98 Atl. 886; *Hibberd v. Philadelphia*, 245 Pa. 265, 91 Atl. 486.

Sufficiency of petition or complaint. *Murray v. Butte*, 51 Mont. 258, 151 Pac. 1051.

⁵⁰ **West Virginia rule.** A law fixing liability for injuries on account

and ice on sidewalks and crosswalks, therefore, creates no liability,⁵¹ unless with respect thereto the municipality is in some manner negligent by disregarding its obligation to exercise ordinary care to keep its sidewalks in fit condition for usual travel.⁵² Instances in which municipal liability may arise are: allowing snow and ice which renders a sidewalk dangerous or unsafe to remain thereon for an unreasonable length of time,⁵³ especially

of ways being out of repair or obstructed applies to obstructions caused by the accumulation of ice and snow. In such cases the municipality can be held liable for an injury due to the accumulated snow and ice upon its sidewalk. It must be shown that its own negligence caused or contributed to the snow and ice being there. That is, such is the rule in the case of towns or other municipal bodies upon which no such statutory liability as above stated, is imposed. But under the West Virginia statute the liability is absolute where the injury is sustained by reason of the sidewalk being out of repair. *Boylard v. Parkersburg*, 78 W. Va. 749, 90 S. E. 347, 350, citing § 2789, vol. 6, ante.

⁵¹ *Gower v. Madisonville*, 182 Ky. 89, 206 S. W. 27.

"We have often held that the municipality is not negligent if it omits to protect pedestrians from dangers to life and health which are caused by the accumulations of ice and snow on sidewalks from natural causes." *Mayo v. Baraga*, 178 Mich. 171, 144 N. W. 517, 519.

In Connecticut decisions it has been said that in that rigorous climate, the duty of cities and towns in respect to snow and ice must be limited. "Snow and ice

do not create a continuous and permanent obstruction to a sidewalk in this section of the country. They disappear many times suddenly, and a defect of this character of today may be removed before tomorrow by the action of the weather." *Ross v. Stamford*, 88 Conn. 260, 91 Atl. 201.

⁵² "The rule is well established that a city is not liable for injuries resulting from the general slipperiness of its streets or sidewalks occasioned by a recent precipitation of rain or snow, * * * but it is liable in all cases where its own negligence is the sole cause of the injury or concurs with a natural cause to produce the injury." *Lueking v. Sedalia*, 180 Mo. App. 203, 208, 167 S. W. 1152.

Accumulation of ice and snow must constitute an obstruction dangerous to public travel of which the city had actual or constructive notice thereof. *Rallya v. New York*, 147 N. Y. S. 953, 162 App. Div. 617.

⁵³ *Wren v. Seattle*, 100 Wash. 67, 170 Pac. 342.

After snow storm sidewalks must be put in safe condition within a reasonable time. *Olson v. St. Paul*, 141 Minn. 434, 170 N. W. 586.

Failure for several days to remove snow from a much-used side-

where it is customary to treat the removal of snow and ice as a regular part of sidewalk management;⁵⁴ failure of the municipality to use ordinary care to remove defects arising out of conditions occurring after the snow had fallen;⁵⁵ the accumulation of snow and ice in a depression which is a defect in the sidewalk, and which defect was the proximate cause of the injury;⁵⁶ if the municipality carelessly causes water to flow on a sidewalk which it knows or should know would produce a dangerous or unsafe condition;⁵⁷ or where a municipality negligently permitted surface water to be drained

walk, in a business section may be negligence. *Lucy v. Norwich* (Conn. 1919), 106 Atl. 762.

Under a statute imposing the duty to keep streets in repair, a municipality which negligently allows ice to remain on a sidewalk is liable for damages to a pedestrian who slips and falls thereon. *Sydney v. Slaney*, 50 Dominion Law Reports (Can.), 351.

⁵⁴ "While, due to the operation of the statutes there in force, municipalities in the New England states are held to a stricter degree of liability, the decided weight of authority elsewhere, as well as the tendency of the more recent decisions, is to hold that a city is not ordinarily liable for mere slipperiness of its sidewalks, occasioned by snow and ice. Where, however, the sidewalk itself is defective, or the snow or ice amounts to an obstruction, or its natural condition has been changed by artificial means, liability may attach; or where it is customary to treat the removal of snow and ice as a regular part of highway management, a failure to do so may become wrongful or negligent."

Jaeger v. Newport, 155 Ky. 110, 159 S. W. 671.

Where all other sidewalks in the neighborhood had been cleaned of snow and ice, and pedestrian slips, etc., on one remaining uncleared, the burden, it was held, rested on the city to prove that it was impossible to clean this one also, if such were the fact. *Williams v. New York*, 214 N. Y. 259, 108 N. E. 448, 451.

⁵⁵ *Finnane v. Perry*, 164 Ia. 171, 145 N. W. 494.

"It has been held that when cold follows a melting of snow, causing a film of ice upon the sidewalks which it is practically impossible to remove, the municipality may, without being guilty of negligence, wait for a change of temperature to remedy the condition." *Bierness v. Missouri Valley*, 162 Ia. 720, 144 N. W. 628, 51 L. R. A. (N. S.) 218.

⁵⁶ *Dracass v. Chicago*, 193 Ill. App. 75.

⁵⁷ *McCarthy v. Fulton*, 170 N. Y. S. 404, 182 App. Div. 337.

Water flowing on street and forming ice, where city knew of it. *Abbott v. Springfield* (Mo. App. 1919), 210 S. W. 443.

across a sidewalk with knowledge that in cold weather it would congeal into an icy, slippery obstruction to travel, without causing such a danger to be removed within a reasonable time after receiving actual or constructive notice of its existence.⁵⁸ In certain seasons and localities, as is well known, it would be burdensome, if not impracticable, to impose the duty on the municipality to keep its sidewalks clear of snow and ice at all times. Pedestrians must assume the risks attending a general slippery condition of sidewalks produced by natural causes and which remain despite the efforts of reasonable care and diligence. Reasonable care, it is plain, does not require the walk to be scraped clean down to the surface, or that mere foot prints made in the soft snow and frozen in that condition should be removed; nor that sand or other material should be placed on the walk to prevent pedestrians walking thereon from slipping. As to snow and ice on sidewalks, concerning the necessity of taking into account local climatic conditions prevailing at the time of inquiry, it has been said in New York, that: "The same rule of liability cannot be applied to a small municipality in the northern part of the state, during the severe winter weather, and to large cities in the southern part of the state."⁵⁹ As a municipal corporation is required to exert due care to keep its sidewalks free from all dangerous or unsafe obstructions which are not the result of natural causes the law recognizes that snow and ice which has been suffered to accumulate upon a sidewalk and to assume an especially dangerous form is such an obstruction, the abatement of which should be included within the scope of the general obligation of the municipality in the proper management of its sidewalks.⁶⁰ Therefore, a municipality is liable only for un-

⁵⁸ *Studer v. St. Joseph* (Mo. App.), 185 S. W. 1196.

⁵⁹ *Mitchell v. Dannemora*, 164 N. Y. S. 917, 919, 178 App. Div. 239.

⁶⁰ *Albritton v. Kansas City*, 192 Mo. App. 574, 577, 188 S. W. 239;

Jackson v. Kansas City, 181 Mo. App. 178, 181, 182.

No liability unless specially dangerous, but ridge of ice concealed by snow may be negligence where city had notice thereof, in

usual and especially dangerous formations of snow and ice on a sidewalk, while it is not liable for general conditions produced by alternate freezing and thawing. Since the law imposes on the municipality no general duty of keeping its sidewalks clear of snow and ice where the only danger to pedestrian is a general slipperiness caused by the thawing and freezing of trampled snow it follows there is no liability. But where snow and ice on a sidewalk are permitted to remain until the surface thereof, by thawing and freezing, or by the reason of travel thereover, has become rough, uneven, rigid and slippery, so as "to become an individualized and comparatively isolated obstruction to travel,"⁶¹ and where

time to remove. *Abbott v. Springfield* (Mo. App.), 210 S. W. 443.

⁶¹*Studer v. St. Joseph* (Mo. App.), 185 S. W. 1196.

Uneven surface with rough places two or three inches above the level, defective and actionable. *Fogg v. Kansas City*, 187 Mo. App. 252, 254, 173 S. W. 712.

Liability arises where pedestrian was seriously injured by falling on a ridge or mound of ice on the sidewalk of main street. *Turner v. Towanda Borough*, 245 Pa. 15, 91 Atl. 212.

A municipality may be liable where one slips and falls on a sidewalk resulting from the collection of hard ice thereon in a rough and uneven condition that covered the walk at the place where the accident occurred for at least two weeks prior thereto, and where the condition of the walk was unusual. *Johnson v. Buffalo*, 165 N. Y. S. 372, 178 App. Div. 295.

Pedestrian fell on ridges of ice on a sidewalk, and an instruction was held proper, to the effect that, if the jury believed that said ridges

and lumps and knots of ice and snow on the day of the accident and for a long time prior thereto rendered said sidewalk at said place dangerous and unsafe and not reasonably safe for pedestrian traveling over and upon said sidewalk at said place it should find for plaintiff. *Cowgill v. St. Joseph*, 180 Mo. App. 327, 167 S. W. 1157.

Ice on sidewalks is an inevitable condition at times during the winter season in northern climates. "When this condition is general over the city there is no help for it, nor liability because of it. But if it is exceptional and is allowed to become hazardous from other causes than its natural formation, the case is different. If, for instance, it is allowed to form in ridges, or separate raised or uneven surfaces, so as to endanger pedestrians there is liability." *Krucker v. St. Joseph*, 195 Mo. App. 101, 190 S. W. 644.

"The general conditions of our variable winter climate which are the work of nature cannot be guarded against—but if the city

this condition had existed for such a length of time that it had become known to the public authorities or should have become known to them in the exercise of reasonable vigilance the municipality will be liable for damages to one injured while attempting in the exercise of ordinary care to pass over such sidewalk.⁶²

In New York in snow and ice cases the interference with travel must be: (1) dangerous; (2) unusual or exceptional; that is to say, different in character from conditions ordinarily and generally brought about by the winter weather prevalent in the given locality.⁶³ The negligence is not in a condition discovered to exist, but in the failure on the part of the municipality to remedy the condition, and this only when it is shown that it is the duty of the corporation to remedy, and remedy is within its power.⁶⁴ Under the Massachusetts statute a

should negligently suffer snow and ice to remain and accumulate in a particular place, until it became of a permanent nature, and a dangerous obstruction to pedestrians, then it would be liable, and this is the measure of its liability.''' Williams v. New York, 214 N. Y. 259, 108 N. E. 448, 450, quoting from Brennan v. New York, 114 N. Y. 578, 580, 130 App. Div. 267, 268.

⁶² DeWall v. Sioux City, 181 Iowa 333, 164 N. W. 640.

Pedestrian fell on a sidewalk and broke his leg. The sidewalk was all covered with snow and hard ice, packed down about two inches thick and had so remained during five or six days before the accident. The condition of the ice was rough where pedestrians had packed down the snow, and ice had formed on the top of it. There had been little flurries of snow some two days prior to the accident. Held, facts show prima facie: (1) A danger-

ous and unusual condition of the street; and (2) the lapse of sufficient time to charge the city with constructive notice of that condition. Williams v. New York, 214 N. Y. 259, 108 N. E. 448.

City's negligence, jury question. Burns v. Waterloo (Ia. 1919), 173 N. W. 16.

Safety of sidewalk, held jury question. Collins v. New York, 173 N. Y. S. 451; Slife v. Dorranceton Borough, 262 Pa. 182, 105 Atl. 39.

⁶³ "This statement of the rule finds support in the principal decisions in this court in snow and ice cases." Williams v. New York, 214 N. Y. 259, 108 N. E. 448, per Bartlett, C. J., reviewing New York cases.

⁶⁴ While a municipality is not liable for ice accumulating on the street in the course of nature, because it cannot prevent this, and so the failure to protect against it does not lay the foundation for a charge of negligence, when snow

city or town is not liable for an injury received upon a public way by reason of snow or ice thereon, "if the place at which the injury * * * was sustained was at the time of the accident otherwise reasonably safe and convenient for travelers." Thus where a pedestrian is injured by falling, not because the sidewalk was defective on account of a depression therein caused by a channel in the center to carry away surface water, but because of slippery ice thereon, there can be no recovery. Moreover, it was held that the slight depression in the walk could not be found to be a defect in the absence of snow or ice, and that the latter must be found to be the sole proximate cause of the accident.⁶⁵

The thickness of the snow or ice, it seems, is of no consequence. In such cases the rule is not analogous to that which prevails in the case of defective sidewalks, namely, that the law will not take into account a slight inequality of the sidewalk, say four inches. "The conditions are too dissimilar to warrant any such analogy. A surface of rough ice two inches thick may be as perilous to the way-farer as if it were a foot in thickness."⁶⁶

d. *Crosswalks.*

§ 2791. What defects actionable in general.⁶⁷

and ice fall and are permitted to remain upon the walk and to be traveled over by pedestrians for such a length of time that it becomes rough, rounded, uneven and irregular, rendering the walk dangerous for travel, and it is made apparent that this condition thus shown to exist, the failure to remove or protect against it becomes actionable negligence, *Allen v. Ft. Dodge*, 183 Ia. 818, 167 N. W. 577.

⁶⁵ *Neilson v. Worcester*, 219 Mass. 88, 106 N. E. 579, following *Newton v. Worcester*, 174 Mass.

181, 187, 54 N. E. 521, 523 (set out in § 2770, vol. 6, ante).

⁶⁶ *Williams v. New York*, 214 N. Y. 259, 108 N. E. 448.

⁶⁷ **Depression** about one inch deep, worn by travel and in area somewhat larger than an ordinary writing tablet, where the water would lie from rain or melting snow. "Such depression is clearly not sufficiently dangerous to charge the defendant (city) with negligence for allowing it to remain, under ordinary circumstances. If there was an accumulation of water in a depression which afterwards

VII. DUTY TO GUARD AND WARN AGAINST DANGER.

§ 2795. General rule.⁶⁸

Unless the place is dangerous the erection of barriers to guard a street or sidewalk is not required.⁶⁹ The duty to place barriers on a street, although travel thereon be in a degree unsafe, or even dangerous, it has been said, is not absolute. The law does not require it unless the danger complained of is unusual.⁷⁰ That is, ordinarily the danger must be of an unusual character to require a guard rail, but whether such a condition exists in a particular case is usually one of fact and is seldom determinable as a matter of law, for example, where an elevated sidewalk is constructed along an embankment. The question whether it is so dangerous as to require a guard rail may or may not be a question of fact.⁷¹

The well settled general rule is that a municipality is required to erect and maintain suitable barriers where there are dangerous places along streets, which without

became ice, and if it thereby became a dangerous thing to travel over the crossing, it has not been shown that the defendant had actual notice of its condition, nor has it been shown that it was permitted to remain there a sufficient length of time to impute notice to the defendant and thereby charge the defendant with the duty of removing it." *Jenkins v. Wilmington*, 5 Boyce 471 (Del. Super.), 94 Atl. 768.

⁶⁸ *Tegtmier v. Covington* (Ky. 1919), 209 S. W. 382.

Where a railing or barrier was required to be erected by a railway company, if the city fails to require such barrier it may be liable for injuries resulting from such failure. *Astoria v. Astoria & C. R. R. Co.*, 67 Or. 538, 136 Pac. 645.

When a warning or guard is necessary, failure to provide, renders street out of repair, and creates liability in event of injury. *Pollock v. Wheeling Traction Co.* (W. Va. 1919), 99 S. E. 267, 270.

⁶⁹ *Elsmere v. Tanner*, 158 Ky. 681, 166 S. W. 220.

⁷⁰ *Swain v. Spokane*, 94 Wash. 616, 162 Pac. 991, L. R. A. 1917D, 754, following *Leber v. King County*, 69 Wash. 134, 124 Pac. 397, 42 L. R. A. (N. S.) 267.

"It has not been deemed necessary in a city of any size to rail all the bridges crossing drains." *Foreman v. Crowley*, 143 La. 654, 79 So. 210.

⁷¹ *Watson v. Duluth*, 128 Minn. 446, 151 N. W. 143.

such protection will render the streets unsafe to travelers in the usual modes by night or day, e. g., where a street abruptly ends at the edge of a precipice.⁷²

"The city is not, as a rule, bound to make safe for travel the area outside of a public street, nor to fence or erect barriers to prevent travelers from straying off the street to adjoining lands upon which there may be dangerous places; but it is bound to provide such guards where the street itself is unsafe for travel by reason of the close proximity of excavations, embankments, deep water, or other pit falls or dangers. This is necessary in order to protect persons passing upon the street. * * * And it is merely a matter of keeping the street safe. It is not negligence for a city to construct and maintain a street or roadway along the top of a bluff. Where the roadway is narrow, and the declivity so near that it may reasonably be anticipated that the passing of vehicles, the shying of horses, or some other incident to traffic may cause some traveler to deviate from the traveled way and to go over the edge, the city may well be required to guard such a pitfall along the roadside. The duty required of a city is that of ordinary care."⁷³

Clearly, a city need not erect guard rails along the edge of a sidewalk where there is a ditch on one side, to protect horses and vehicles from falling into such ditch.⁷⁴

Failure to erect a barrier which would not have prevented the particular injury had the injured not been negligent is of no consequence.⁷⁵

§ 2796. Same—dangers created by third persons.⁷⁶

The municipality is required to exercise ordinary care

⁷² *Chance v. St. Joseph*, 195 Mo. App. 1, 190 S. W. 24, 26.

⁷³ *Bridlia v. St. Paul*, 134 Minn. 97, 158 N. W. 794.

⁷⁴ *Dudley v. Smithland*, 174 Ky. 248, 192 S. W. 21.

⁷⁵ Failure to maintain a guard rail on a sidewalk bordering a

ditch, is of no consequence where one allows his horse to draw him onto the sidewalk, and results in being overturned into the ditch. *Dudley v. Smithland*, 174 Ky. 248, 192 S. W. 21.

⁷⁶ *Seagraves v. Winston*, 170 N. C. 618, 87 S. E. 507; *Gellenbeck*

to guard or warn travelers against such injuries as might be reasonably anticipated from dangers in its streets which may result from excavations or obstructions,⁷⁷ although created by others,⁷⁸ e. g., independent contractors.⁷⁹ As to street construction, reconstruction or repairing, at designated places, the fact that the municipality is having the work done or requiring it to be done, is notice to the municipality of its duties in such situation.⁸⁰

§ 2797. Same—guards required by ordinance.⁸¹

v. Mobridge, 40 S. D. 157, 166 N. W. 631; Rowe v. Richards, 32 S. D. 66, 142 N. W. 664.

Contractor improving street need not be notified of defect. Marmer v. Richard Carvel Co., 167 N. Y. S. 850.

⁷⁷ Johnson v. New York, 208 N. Y. 77, 101 N. E. 691.

⁷⁸ Telephone company making excavations in a street. Meck v. Nebraska Telephone Co., 96 Neb. 539, 148 N. W. 325.

⁷⁹ Sewer pipes were being laid in the street by independent contractor. Frohs v. Dubuque, 169 Ia. 431, 150 N. W. 62.

Excavation due to grading contractor. There were no barriers or lights. Plaintiff fell into excavation and was injured. City, held negligent. Robinson v. Kansas City (Mo.), 181 S. W. 1004.

Pedestrian fell into a trench dug by a contractor in a street not guarded by lights or barriers. Verdict for plaintiff was sustained. Schumm v. Anderson (Tex. Civ. App.), 172 S. W. 1121.

⁸⁰ In case of an excavation in the street made by a contractor, it is the duty of the city to protect

the public against such an excavation, whether dug by the city or a contractor, and the city is required to take notice thereof. Doubia v. Ottawa, 200 Ill. App. 131.

The street was being paved. "The city was therefore undoubtedly guilty of negligence in permitting rock, which had been piled in the street at the point named, to be left there at night, without appropriate signals of danger." Huntsville v. Phillips, 191 Ala. 524, 67 So. 664.

⁸¹ Fernald v. Eaton & Smith (Cal. App.), 180 Pac. 944; Sutter v. Metropolitan St. Ry. Co. (Mo. App.), 208 S. W. 851; Robinson v. Kansas City (Mo.), 181 S. W. 1004; Kelly v. Walsh, 177 Mo. App. 318, 164 S. W. 135; Schlinski v. St. Joseph, 170 Mo. App. 380, 384, 156 S. W. 823; Meck v. Nebraska Telephone Co., 96 Neb. 539, 148 N. W. 325.

Obstruction visible. Wagon run into pile of macadam almost half way across the street, and some three or four feet high which was visible by light of street lamps. There was no warning light as ordinance required. "And in such

§ 2799. Application of rule to particular dangers.

Obstructions of streets in building construction lawfully permitted by the municipality should have barricades, barriers or lights or other appropriate means to warn the public of danger.⁸² Where a street is undergoing repair it should either be closed to travel or the city should maintain proper barriers, etc.⁸³ When the public streets of a city or town are rendered unsafe by reason of repairs being made therein, or have become defective or unsafe from any cause, and the authorities have notice of the condition, or the circumstances are such as to warrant a presumption of notice, the duty to warn the public by lights or other means, while such repairs are being made, or the unsafe condition exists, arises. The traveler is not bound to make investigations, and he cannot be charged with negligence if he fails to do so.⁸⁴ Where two sidewalks joined, one of plank and the other of cement, and the plank walk was six inches lower than the cement walk, it was held incumbent upon the city to

event his hurt was due to his failure to avoid an obstruction plainly visible, and which he saw or ought to have seen." *Hunt v. St. Louis*, (Mo.), 211 S. W. 673, 678.

⁸² Building or rebuilding streets; if there are signals, etc., there is no liability. *Tegtmier v. Covington*, 183 Ky. 312, 209 S. W. 382.

Paving material in street without danger signal, over which plaintiff's wagon ran and upset. *Luckey v. Kansas City*, 169 Mo. App. 666, 155 S. W. 873.

⁸³ *McCarthy v. Stoneham*, 223 Mass. 173, 111 N. E. 698; *Welsh v. South Omaha*, 98 Neb. 148, 152 N. W. 302; *Bell v. Greensboro*, 170 N. C. 179, 86 S. E. 1041.

The street was undergoing grading and excavation was made therein. If there are no barriers or danger signals to warn travelers,

in case of accident the city will be liable. *Cook v. Nebraska City*, 98 Neb. 205, 152 N. W. 390.

Street was being repaved. Driver of wagon was thrown out of his wagon by wheels dropping into a hole. No barriers, light or warning of any kind. Verdict for plaintiff was upheld. *Burton v. Kansas City*, 181 Mo. App. 427, 168 S. W. 889.

Street was being paved. Pedestrian at night fell over an obstruction and was injured. Negligence was failure to have barriers, warning, etc. Verdict for plaintiff sustained. *Schlinski v. St. Joseph*, 170 Mo. App. 380, 156 S. W. 823.

⁸⁴ *Snyder v. Chinook*, 48 Mont. 484, 138 Pac. 1090, quoting with approval from *McCabe v. Butte*, 46 Mont. 65, 125 Pac. 133.

provide signals or warning if the walk was in common use and dangerous, or unsafe, and it knew, or in the exercise of reasonable care ought to have known its condition.⁸⁵ All obstructions,⁸⁶ ditches,⁸⁷ and excavations,⁸⁸ in public ways which are dangerous or unsafe, and likely to result in injury to travelers using such ways in a proper manner should be protected by suitable warning signs or signals.⁸⁹

§ 2800. Same—declivities and embankments.⁹⁰

⁸⁵ If the light was so placed as to throw a shadow over the offset the question of the negligence of the city and the contributory negligence of the plaintiff were for the jury. *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323.

⁸⁶ A bridge which forms an obstruction in the middle of the carriage way imposes the duty on the municipality to light it at night in order to give notice of the existence of the obstruction to those lawfully using the highway. *Gaines v. New York*, 142 N. Y. S. 401, 404, 156 App. Div. 789, affirming 137 N. Y. S. 964, 78 Misc. Rep. 126.

Pile of brick in street; light at night is necessary. *Sutter v. Metropolitan St. Ry. Co.* (Mo. App.), 208 S. W. 851.

⁸⁷ Unguarded ditch made an opening in a walk. Such ditch should be barricaded or guarded in some way. *Baleom v. Independence*, 178 Ia. 685, 160 N. W. 305.

⁸⁸ *Fernald v. Eaton & Smith* (Cal. App.), 180 Pac. 944.

Excavation in middle of street should be guarded by railing and light at night. *Miller v. Duluth*, 134 Minn. 418, 159 N. W. 960.

Plaintiff drove into an excava-

tion in a street at its intersection with a well-traveled road, without barriers or signals or warning of any kind. Municipality held liable. *De Long v. Oklahoma City* (Okl.), 148 Pac. 701, L. R. A. 1915E, 597.

A city is negligent to permit an excavation to remain in a street unguarded. The pedestrian stepped off a sidewalk into an unguarded hole in the street where years before a catch basin for a sewer had been put in and the hole left open. *Dinneen v. Ottawa*, 200 Ill. App. 303.

⁸⁹ When necessary to protection of travelers. *Pollock v. Wheeling Traction Co.* (W. Va.), 99 N. E. 267.

⁹⁰ *Johnson v. State*, 173 N. Y. S. 701; *Dallas v. Halford* (Tex. Civ. App.), 210 S. W. 725.

Smith v. Rexburg, 24 Idaho 176, 132 Pac. 1153; *Chance v. St. Joseph*, 195 Mo. App. 1, 5, 6, 190 S. W. 24; *Haughney v. Mahanoy City Borough*, 264 Pa. 482, 107 Atl. 843.

Pedestrian fell from an elevated sidewalk constructed along an embankment where there was no railings or guards. The city was held liable. *Watson v. Duluth*, 128 Minn. 446, 151 N. W. 143.

Steep embankment along a public road; duty of city to erect a

§ 2801. Same—persons coming on street from private property or way.⁹¹

§ 2804. Sufficiency of guard or warning.⁹²

The test is whether the means employed are reasonably sufficient for the purpose intended.⁹³ Under particular facts the sufficiency is often a question for the jury.⁹⁴

“The object of a barrier is to give warning of danger, but where the condition of the street is itself a danger signal, the necessity of a barrier is removed.” Thus a building being removed, standing in the street, erected

railing or sufficient guard, where the lack of reasonable protection at such place renders the traveled way itself unsafe. *District of Columbia v. Washington*, 44 App. D. C. 120.

Where a street is close to a deep ravine, it is negligence on the part of the city to permit its use at night without sufficient guards. In such case there should be a barrier or some kind of a red light or other appropriate danger signal to indicate the presence of the ravine or gulch. *Beach v. Seattle*, 85 Wash. 379, 148 Pac. 39.

Failure to guard an embankment and excavation in a street that had been recently graded. The embankment had been left in its natural state. The plaintiff fell down the embankment at night. Held, city not required to guard portions of its streets left in a state of nature. *Robinson v. Kansas City*, 179 Mo. App. 211, 166 S. W. 343.

Dangerous declivity. *Bond v. Billerica* (Mass. 1919), 126 N. E. 281.

Whether failure to maintain barrier, held jury question. *Dallas*

v. Halford (Tex. Civ. App. 1919), 210 S. W. 725.

⁹¹ *Kirkham v. Kansas City*, 89 Kan. 651, 132 Pac. 160.

⁹² *Meek v. Nebraska Telephone Co.*, 96 Neb. 539, 148 N. W. 325.

⁹³ It has been held that the test of the sufficiency of the warning, as where an awning or shed has fallen on a sidewalk, does not depend on whether or not barriers or similar means are employed but on whether or not the means actually employed, whatever they may be, are reasonably sufficient for the purpose. Hence, an instruction which limits the city to use of certain methods of precaution is misleading and erroneous. In such a case the city is required to use only such means as are reasonably sufficient to warn pedestrians of the dangerous condition of the shed and sidewalk and the jury should have been so instructed. *Gatewood v. Frankfort*, 170 Ky. 292, 185 S. W. 847.

⁹⁴ *Doubia v. Ottawa*, 200 Ill. App. 131; *State v. Baltimore*, 129 Md. 686, 99 Atl. 860; *Hall v. Flint*, 196 Mich. 638, 162 N. W. 270; *McMasters v. Lincoln*, 101 Neb. 278, 163 N. W. 319.

upon cribbing four or five feet high, was regarded as a danger signal.⁹⁵ The obligation to erect a railing sufficiently strong to keep automobiles from going over an embankment, it has been held, is not imposed; but that a railing sufficient to protect travel generally is enough.⁹⁶

§ 2806. Duty to light streets.

Aside from statutory or charter requirement a city or town is under no duty to light its streets; it may, if it chooses, leave them unlighted, and cannot be made liable in damages to a traveler who is injured solely because of its failure to light them,⁹⁷ and under the Massachusetts highway act, even if the way unlighted be dangerous.⁹⁸ If, however, there are defects or unsafe places in a street or sidewalk, the city is under a duty to exercise ordinary care to warn the traveling public by lights or other reasonably sufficient means in the night time of these defects or unsafe places and if it fails to do this, will be liable to any person injured by reason of such failure. Instances are excavations,⁹⁹ a hole in a sidewalk,¹ a water

⁹⁵ *Lombardi v. Bates & Rogers* Const. Co., 88 Wash. 243, 152 Pac. 1025, 1027, approving *Hunter v. Montesano*, 60 Wash. 489, 111 Pac. 571, Ann. Cas. 1912B, 955.

⁹⁶ *Bond v. Bellerica* (Mass. 1920), 126 N. E. 381.

⁹⁷ *Gee's Admr. v. Hopkinsville*, 154 Ky. 263, 157 S. W. 30; *Dudley v. Smithland*, 174 Ky. 248, 192 S. W. 21; *Williams v. Washington*, 142 Ga. 281, 82 S. E. 656; *Greensboro v. Robinson*, 19 Ga. App. 199, 91 S. E. 244.

⁹⁸ Plaintiff fell near the bottom of a flight of steps in an underground passageway which was duly laid out and maintained by the city as a public way. It was contended that as the passageway was "continuously dark" it was not

reasonably safe for travelers. The court in denying negligence on the part of the city said: "Whatever may be the measure of duty of a municipality to erect and maintain barriers and lights to warn and to guard against defects and obstructions in public ways, it is settled in this commonwealth that the mere failure to provide and maintain proper lights in its streets is not negligence under the highway act, even if the way unlighted be dangerous." *Hill v. Boston*, 131 Mass. 372, 121 N. E. 24, per *Pierce, J.*

⁹⁹ Excavation run into by automobile. No signal lights. It was the duty of the city "to place signal lights at the point of danger to warn travelers on the highway

pipe above the surface of a sidewalk,² a hydrant in a street in a dangerous position,³ and a bridge constructed with the girder and truss in the middle of the carriage-way.⁴

And where streets are undergoing reconstruction or repair, reasonable supervision over such improvement work and care of streets require that proper lights shall be placed at excavations, piles of material,⁵ piles of dirt and other obstructions and excavations incident to such work.⁶ If the public ways are in a reasonably safe condition for travel, containing no important defects or un-

thereof." *Kendall v. Des Moines*, 183 Ia. 866, 167 N. W. 684.

¹ Hole left in sidewalk by abutting owner who constructed it to light his basement. It had remained twenty-one days without light at night, nor was there street light. Verdict for plaintiff was sustained on the ground of the city's negligence. *Gellenbeck v. Mobridge*, 40 S. D. 157, 166 N. W. 631.

² A one inch water pipe placed on the sidewalk by a city one inch or more above the surface thereof should be protected at night by a warning sign as a light. "It is clearly negligence for the city to place such an obstruction on a sidewalk without protecting it at night by a light, or in some other way." *Blackwell v. Seattle*, 97 Wash. 679, 167 Pac. 53.

³ Hydrant placed in street in dangerous position unguarded without lights and a pedestrian collided therewith at night, the municipality will be liable. *Berger v. Solvay*, 141 N. Y. S. 995, 156 App. Div. 440.

⁴ Should be lighted at night in order to give notice of the exist-

ence of the obstruction to those lawfully using the highway. *Gaines v. New York*, 142 N. Y. S. 401, 404, 156 App. Div. 789, following *Coreoran v. New York*, 188 N. Y. 131, 80 N. E. 660.

Pleading absence of light as bearing on question of contributory negligence. *Birkhimer v. Sedalia* (Mo. App.), 200 S. W. 298, 300.

Whether absence of light was proximate cause of injury, question of fact for jury. *State v. Baltimore*, 129 Md. 686, 99 Atl. 860.

⁵ A pile of sand and crushed stone deposited in a street by a contractor was run into by an automobile, no light. Verdict for plaintiff was upheld. *Britt v. Omaha Concrete Stone Co.*, 99 Neb. 300, 156 N. W. 497.

⁶ *Hardy v. West Coast Const. Co.*, 174 N. C. 320, 93 S. E. 841, following *Kinsey v. Kinston*, 145 N. C. 106, 58 S. E. 912.

Street was being repaired. There was no warning light, but an arc light at street intersection was burning, but it was insufficient. *Burton v. Kansas City*, 181 Mo. App. 427, 168 S. W. 889.

safe places, a municipal corporation has a broad discretion as to the number and character of lights that it will establish, and cannot be made liable in damages for the failure to furnish such number and quality of lights as would better illuminate the streets than those provided.⁷

If a municipality allows a street to remain out of repair, or in a dangerous condition the fact of the absence of lights or safeguards of any character at the place may be considered along with all of the other evidence in determining whether there is negligence in failing to keep the street in a reasonably safe condition for passage.⁸ The absence of a light, it has been held, constitutes "a defect in the street," e. g., failure to light an electric light at the crossing of two well-traveled streets, where a collision between an automobile and a bicycle occurred.⁹

VIII. NOTICE OF DEFECTS.

§ 2807. Necessity for.

Late decisions adhere strictly to the general rule that, to render a municipality liable for injuries for failure to keep its public ways in a reasonably safe condition it must appear that it knew, or had reasonable cause to know, of the defective condition a sufficient length of time prior to the accident to enable it to put the way in

⁷ *Gee's Admr. v. Hopkinsville*, 154 Ky. 263, 157 S. W. 30.

"It is not an absolute duty imposed upon the corporation to light its streets, and when it does so the placing of the lights is left largely to its discretion." *Rollins v. Winston-Salem*, 176 N. C. 411, 97 S. E. 211.

⁸ *Greensboro v. Robinson*, 19 Ga. App. 199, 91 S. E. 244; *Williams v. Washington*, 142 Ga. 281, 82 S. E. 656, L. R. A. 1915A, 325 Ann. Cas. 1916B, 196.

Absence of light. Fell down

granitoid steps as a continuation of a sidewalk; verdict for plaintiff was sustained. *Birkhimer v. Sedalia* (Mo. App.), 200 S. W. 298.

Plaintiff fell through a defective culvert over a street crossing which had been out of repair a sufficient length of time to charge the city with notice of its condition. It was a very dark night and there were no street lights. City held liable. *Ledbetter v. Kirksville*, 167 Mo. App. 195.

⁹ *Sexton v. Rock Hill*, 107 S. C. 505, 93 S. E. 180.

a state of repair.¹⁰ Expressed in other phrase, notice, actual or constructive, to the municipality of the particular defect is essential,¹¹ unless the public way had been rendered unsafe by the direct act, order or authority of the city or town.¹² And the same rule is uniformly applied where the defect producing the accident was caused by a third person.¹³ Statutes deny actions against a

¹⁰ *St. James v. Stacy*, 203 Fed. 35, 121 U. C. A. 371; *Smith v. Marceline* (Mo. App.), 198 S. W. 1116; *Ballance v. Granite City*, 188 Ill. App. 315.

When notice to city is not material. *Wallower v. Webb City*, 171 Mo. App. 214, 156 S. W. 48.

¹¹ *Georgia. Brown v. Milledgeville*, 20 Ga. App. 392, 93 S. E. 25.

Kentucky. Ashland v. Boggs, 161 Ky. 728, 171 S. W. 461; *Schmidt v. Newport*, 184 Ky. 342, 212 S. W. 113; *Tudor v. Louisville*, 172 Ky. 428, 189 S. W. 456, 458.

Louisiana. Carroll v. New Orleans Ry. & Light Co., 132 La. 683, 61 So. 752.

Maryland. Long v. B. F. Sweeten & Son, 123 Md. 88, 90 Atl. 782; *Delmar v. Venables*, 125 Md. 471, 94 Atl. 89, 91.

New York. Schmidt v. New York, 167 N. Y. S. 23, 179 App. Div. 667; *Engel v. New York*, 146 N. Y. S. 307; *Ruppert v. New York*, 153 N. Y. S. 100, 90 Misc. Rep. 365.

N. Carolina. Dowell v. Raleigh, 173 N. C. 197, 91 S. E. 849, 852; *Sehorn v. Charlotte*, 171 N. C. 540, 88 S. E. 782.

Oklahoma. Bellevue Gas & Oil Co. v. Carr (Okl.), 161 Pac. 203.

Texas. Ft. Worth v. Weisler (Tex. Civ. App.), 212 S. W. 280.

Washington. Chase v. Seattle,

80 Wash. 61, 141 Pac. 180; *Wilton v. Spokane*, 73 Wash. 619, 132 Pac. 404.

Horse shied at a boiler on or close to the street and fell into a lake; creates no liability unless the city had notice of the defect. *Hazlehurst v. Shows*, 113 Miss. 263, 74 So. 122.

Defect in sidewalk due to removal of brick. To create liability on the part of the city, notice, actual or constructive, of such defect must be shown. *Vannort v. Chestertown*, 132 Md. 685, 104 Atl. 113.

Pedestrian fell on ice that had formed a few hours before on the sidewalk. There was no evidence that the borough authorities had actual notice of it, and it had not existed for such a length of time that constructive notice could be imputed to them. *Swan v. Indiana Borough*, 242 Pa. 596, 89 Atl. 664.

City must take notice of excavation made by a contractor. *Dauvia v. Ottawa*, 200 Ill. App. 131.

¹² *Woodward v. Bowder* (Okl.), 149 Pac. 138.

¹³ *Eagan v. Covington*, 166 Ky. 825, 179 S. W. 1026.

A barrel stave was kicked by a policeman heading a procession and it struck a bystander on the sidewalk, held in the absence of notice, city is not liable. *Evans v.*

municipality for injuries to person or property sustained in consequence of any public way being defective, out of repair, unsafe, dangerous or obstructed without the giving of written notice of the defective condition to the municipality or named officers thereof, and unless there was a failure within a reasonable time thereafter to repair or remove the defect specified, or in the absence of such notice unless it appears that the defective condition existed for so long a period that the same should have been discovered and remedied by the municipality in the exercise of reasonable care and diligence.¹⁴

Des Moines, 169 Ia. 321, 151 N. W. 397.

A pole of a light company in the street fell upon and killed a child. As the basis of an action against the municipality "is negligence and its duty is that of inspection, it must be shown that it had knowledge of the defect or might have known thereof by the use of reasonable care and watchfulness. * * * Its duty in the care of its streets was not to seek for defects, but to observe them when they became observable in the exercise of reasonable supervision." *Kost v. Ashland Borough*, 236 Pa. 164, 84 Atl. 691.

Notice of dangerous condition of a billboard on a sidewalk and sufficient time to enable the city to correct the situation is necessary. In absence of some information it is not bound to investigate. *Van De Vere v. Kansas City* (Mo. App.), 196 S. W. 765.

In an action due to a shed falling on a sidewalk if the city officers were present when it fell and the injury for which suit was brought occurred four hours there-

after, the question whether by the exercise of ordinary care the city could have discovered the dangerous condition in time to take reasonable precaution for the injury was for the jury. *Gatewood v. Frankfort*, 170 Ky. 292, 185 S. W. 847.

The fall of a tree due to the negligence of the tree warden and his assistants creates no municipal liability where there was nothing to warrant a finding that the tree was a menace to the public safety for such a length of time that the city had, or in the exercise of proper care and diligence might had, reasonable notice of its condition. *Leary v. Newburyport*, 216 Mass. 225, 103 N. E. 477; *Donohue v. Newburyport*, 211 Mass. 561, 98 N. E. 1081, Ann. Cas. 1913B, 742.

¹⁴ *Minton v. Syracuse*, 158 N. Y. S. 470, 473, 172 App. Div. 39.

Statutes requiring notice are strictly construed. *Dallas v. Shows* (Tex. Civ. App.), 212 S. W. 633.

Statute requiring, to create liability, valid. *Grambs v. Birmingham* (Ala. 1919), 80 So. 874.

§ 2808. Same—notice not necessary where original negligence that of municipality.¹⁵

“It is only in cases where the negligence relied on is the failure of the city to remove an obstruction or to repair a defect in the street not caused by its own act or neglect that the question of notice of obstruction or defect is an essential element.”¹⁶ Thus where the defect is not the result of an accidental or wrongful act of another, but the natural consequence of negligence in the original construction by the city of which it was charged with notice from the beginning and which it was under a continuous duty to repair, actual or constructive notice is not necessary to fix municipal liability.¹⁷

§ 2809. Same—where original negligence that of licensee.¹⁸

¹⁵ *Youngblood v. Mason City*, 165 Ia. 488, 146 N. W. 20; *McMasters v. Lincoln*, 101 Neb. 278, 163 N. W. 319.

Defect was ditch in a sidewalk which the city directed to be dug, in which case city has notice of the defect. *Henderson v. Fields* (Tex. Civ. App.), 194 S. W. 1003.

“It is well settled in this state that the defendant (municipality) is not entitled to notice where it created the obstruction in the sidewalk which caused the injury.” *Elrod v. Franklin*, 140 Tenn. 228, 204 S. W. 298, 302; *McCarthy v. Mountain View*, 136 Tenn. 133, 188 S. W. 595; *Hughes v. Nashville*, 137 Tenn. 177, 192 S. W. 916.

¹⁶ *Murray v. Seattle*, 96 Wash. 646, 165 Pac. 895, 899, citing § 2808.

¹⁷ *Trippensee v. Jefferson City*, 174 Mo. App. 727, 730, 161 S. W. 303.

Where city is negligent in the

original construction of a sewer cover which becomes displaced by a pedestrian stepping on it, it is chargeable with notice of defect. *Trippensee v. Jefferson City*, 174 Mo. App. 727, 161 S. W. 303.

A structural defect in the cover of a coal hole in the sidewalk existing the city is chargeable with notice of the defect from the beginning. The cover of a coal hole in a sidewalk made to fit not into an iron collar but to rest upon a stone shoulder which cannot be fastened from within and which tips when trodden upon is a structural defect. *Hebenheimer v. St. Louis*, 269 Mo. 92, 99, 100, 189 S. W. 1180.

¹⁸ See § 2751, ante.

Street carnival. *Augusta v. Jackson*, 20 Ga. App. 710, 93 S. E. 304.

Permission to use sidewalk for building material is ample notice

§ 2810. Notice to particular persons as imputed to municipalities.¹⁹

The notice must be through some officer or agent of the city whose duty, in some way, relates to the care of its streets.²⁰ "Notice to such officers as the city marshal or night watchmen in respect to the unsafe condition of a sidewalk is not, ordinarily notice to the city; but when such officer is authorized, as by the city council or mayor, to observe and report or otherwise preventively act in respect to such condition, or the danger therein, notice to him is sufficient."²¹

Notice to the mayor of the city or a councilman or street commissioner or a member of the committee on

to city. *De Garmo v. Vogt*, 151 Ky. 847, 152 S. W. 969.

Permission granted by city to make excavation—no notice required. *Repperd v. Chapin*, 190 Mich. 19, 155 N. W. 706.

Where city authorizes contractor to do something rendering a street unsafe, requiring warning lights, no notice of contractor's failure need be proved, etc. *Burton v. Kansas City*, 181 Mo. App. 427, 437, 168 S. W. 889.

Granting permit for specified work in a highway for the benefit of the licensee is ample notice to the city, for all obstructions reasonably to be anticipated. *Fitch v. Hartford*, 92 Conn. 365, 102 Atl. 768.

A permit was granted by the city to construct a brick building adjacent to the sidewalk. In such case the city must be charged with knowledge that the building was in course of construction. This imposed upon the city the duty of placing proper guards or obstructions across the sidewalk that would prevent people from passing

along the sidewalk at that place while the wall was in course of construction. *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664, 668.

¹⁹ *Gakes v. Oneida*, 167 N. Y. S. 389, 180 App. Div. 118.

²⁰ *Birmingham v. McKinnon* (Ala.), 75 So. 487, quoting with approval part of § 2810, vol. 6, ante.

Notice to a day laborer of defect in a street is not notice to the town. *Monds v. Dunn*, 163 N. C. 108, 79 S. E. 303.

Actual notice of defect of park commissioners of a sidewalk near a bathing beach, held not to be notice to the board of public works who had general charge of the city streets. "In order to charge a city with actual notice, such notice must be brought home to some officer or person who is in some way chargeable with the duty of maintaining the streets in proper condition." *MacDermid v. Seattle*, 93 Wash. 167, 160 Pac. 290.

²¹ *Woodward v. Bowder* (Okla.), 149 Pac. 138.

streets and alleys is sufficient.²² And notice to a policeman,²³ particularly a police officer in charge of a police precinct in which the defective street was, has been held notice to the city.²⁴

§ 2811. Actual notice.²⁵

It is not essential that the municipality have actual knowledge.²⁶ The city's actual knowledge of the defective condition of one of its streets or sidewalks may be shown by circumstantial as well as by direct evidence.²⁷

Where the charge is negligent maintenance of a ladder on one side of a street, near a market building, evidence is admissible bearing on the issues of actual and constructive notice to the city relating to the character of the use of the building and street, to the number of employees of the city on duty in and around the building, and to the duties of the various employees with respect to the removal or reporting of obstructions in the street and passage ways.²⁸

²² *Blake v. Bedford*, 170 Ia. 128, 151 N. W. 74, 78.

Notice to superintendent of street of defect in street is notice to city. *Newport v. Zimmerman*, 152 Ky. 582, 153 S. W. 969.

"Notice to a street commissioner, or to the member of a common council of a city of a defective condition of a street or crossing is actual notice to the city." *Hammond v. Jahuke*, 178 Ind. 177, 99 N. E. 39.

²³ Policeman had knowledge of defect, and hence city was charged with notice thereof. *Willis v. St. Joseph*, 184 Mo. App. 428, 171 S. W. 27, following *Carrington v. St. Louis*, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108.

²⁴ *Engel v. Minneapolis*, 138 Minn. 438, 165 N. W. 278.

Evidence that notice was given to a police officer while he was on duty of a defective coal hole in the sidewalk which caused personal injury, and evidence that police officers on duty in the district examined the coal hole and testified that it was secure, held to be evidence of actual notice to the city. *Hebenheimer v. St. Louis*, 269 Mo. 92, 100, 189 S. W. 1180.

²⁵ *Saxon v. Houlka*, 107 Miss. 161, 65 So. 124; *Huyler v. New York*, 145 N. Y. S. 650, 160 App. Div. 415.

²⁶ *Cushing v. Bowdlear* (Okl.), 177 Pac. 561; *Lawton v. Hills*, 53 Okl. 243, 156 Pac. 297.

²⁷ *McNiell v. Cape Girardeau* (Mo.), 190 S. W. 327.

²⁸ *Spalding v. Ziegler*, 173 Mo. App. 698, 160 S. W. 14.

§ 2813. Constructive notice.²⁹

By constructive notice is meant such notice as the law imputes in the circumstances of the case.³⁰ Constructive notice is established when the evidence shows that the defective condition, although not actually known by the city, could have been known by the exercise of ordinary diligence and care on its part.³¹ To charge the city with constructive notice the defect must be either open and notorious,³² or apparent by a reasonable inspection,³³

²⁹ McKelvey v. Juniata Borough (Pa. 1919), 108 Atl. 205; Smith v. New Orleans, 135 La. 980, 66 So. 319 (citing § 2813, vol. 6, ante); Annapolis v. Stallings, 12 Md. 343, 93 Atl. 974; Madison v. Antigo, 153 Wis. 287, 141 N. W. 265.

Rule applies only to such defects as might have been discovered by ordinary diligence. New Albany v. Slattery (Ind. App. 1919), 124 N. E. 755.

³⁰ Delmar v. Venables, 125 Md. 471, 94 Atl. 89, 91.

³¹ Tudor v. Louisville, 172 Ky. 429, 189 S. W. 456.

Where city should have known of defect it will be chargeable with notice. Lifschitz v. Chicago, 194 Ill. App. 488.

Evidence to support the implied notice on the part of the city by reason of the evidence that the defect had caused previous accident is admissible. This proves implied notice to the city of the defect, as here a chuckhole. Richardson v. Seattle, 97 Wash. 521, 166 Pac. 1131.

The fact that one pedestrian out of a multitude had met with an accident at a particular place on the street is not sufficient to charge

the city with constructive notice that the street was in a dangerous condition. O'Brien v. New York, 170 N. Y. S. 592, 595, 182 App. Div. 810.

³² Open and obvious hole in a sidewalk existing more than a year, binds city. Dolding v. St. Charles, 166 Mo. App. 403, 149 S. W. 51.

Accumulation of debris on street, existing about three weeks, inference the city had notice. Starkey v. Greenville, 189 Mo. App. 352, 175 S. W. 314.

Lumber stored in street, etc. Dougherty v. St. Louis, 251 Mo. 514, 158 S. W. 326.

Of dangerous condition of billboard on sidewalk. Van De Vere v. Kansas City (Mo. App.), 196 S. W. 785.

Water pipe sticking above dirt walk for considerable time. Sunapi v. Lee (R. I. 1918), 102 Atl. 961.

Whether grating over a sewer intake was broken was known to city. Lichenberg v. Seattle, 94 Wash. 391, 162 Pac. 534.

Whether defective condition of a tree which fell on pedestrian was sufficiently open and notorious as to be constructive notice to the city. Indianapolis v. Slider, 56 Ind. App. 230, 105 N. E. 56.

“and as to those defects a reasonable time must elapse before it may be said that the city should be charged with notice.”³⁴

As to notice whether a sign which was suspended over a sidewalk for at least one month, was so low that a pedestrian struck his head against it and was injured, is jury question. *Baillie v. Wallace*, 24 Idaho 706, 135 Pac. 850, 853; *Powers v. Boise City*, 22 Idaho 286, 125 Pac. 194.

As a result of a violent storm it was known that trees and wires had fallen indiscriminately throughout the city. While it would be impossible for the city to clear all the streets of obstructions at once, it might be practicable a few hours after the storm had abated to locate all fallen trees, and to guard against accidents by affixing lights at points of danger. Must exercise an active vigilance over the streets. A city officer cannot be indifferent, fold his arms, shut his eyes, etc. He had means of knowing. *Ferguson v. Newburgh*, 161 N. Y. S. 573, 174 App. Div. 554.

³³ A metallic curb box placed on the sidewalk by the city over which pedestrians tripped and fell. “The curb box over which plaintiff fell was placed in the sidewalk by agents of the city in violation of its own ordinance. Officers and agents of the city saw the curb box in this position weekly and monthly, or at least they should have seen it. The slightest inspection upon the part of the city would have disclosed the improper location of the curb box. The city insists that at the time it was

installed it was level with the surface of the sidewalk, if not covered entirely over. But it must be admitted that it was improperly located by the city through its agents, and in violation of its ordinance. It is fair to presume that the city had a record of its location in its office to which its agents and officials had easy access, and if they did not actually see and know the negligent conditions which the curb box created, it must be held in law to have done so.” *Elrod v. Franklin*, 140 Tenn. 228, 204 S. W. 298, 302.

³⁴ *Green v. Philadelphia*, 63 Pa. Super. Ct. 121, 123, 124.

Imputable where city by the exercise of ordinary care could have discovered and repaired defect prior to accident. It may be inferred, etc. *Hammond v. Jahuke*, 178 Ind. 177, 99 N. E. 39; *Valparaiso v. Chester*, 176 Ind. 636, 96 N. E. 765, 768.

Where city might have known of the defect by the exercise of proper care and diligence, and which could have remedied it by the exercise of reasonable care, a basis for liability is laid. *Thomas v. Winthrop*, 222 Mass. 456, 111 N. E. 173.

Under the Massachusetts statute making cities liable for personal injuries for defects in highways where such injury might have been prevented or the defect remedied by the city in the exercise of reasonable care, the burden is on a plaintiff as a condition precedent

§ 2814. Same—constructive notice based on length of time.

Without variableness the late decisions apply the general rule that if the defective condition or danger which caused the injury has existed for such a period of time that the municipal authorities by the exercise of ordinary care and diligence must have known of its existence, and could have guarded the public against it and failed to do so, notice will be imputed.³⁵ "It is the duty of the

to recovery to establish that the defect which caused the injury was one of which the municipality had knowledge, or by the exercise of reasonable care and diligence might have had knowledge, in time to have remedied it or to have prevented the injury. *Hamilton v. Cambridge*, 219 Mass. 418, 106 N. E. 1018.

Whether city had constructive notice and could have remedied, often fact question for jury. *Louisville v. Monroe*, 163 Ky. 412, 173 S. W. 1107.

The North Carolina cases support the proposition that the question of constructive notice is generally a question of fact. Because the conditions are so varying under which the principle is applied, it is impossible in any case to declare as matter of law that there is or is not constructive notice. "The locality in which the defect exists, whether in remote section or in a much used and frequented street, the conspicuousness of the defect so that it may be readily discovered, and other circumstances, have to be considered." *Foster v. Tryon*, 169 N. C. 182, 85 S. E. 211.

³⁵ Alabama. *Birmingham v. Muller*, 197 Ala. 554, 73 So. 30.

Idaho. *Powers v. Boise City*, 22 Idaho 286, 125 Pac. 194.

Illinois. *Long v. Chicago*, 178 Ill. App. 577; *Dracass v. Chicago*, 193 Ill. App. 75.

Iowa. *Johnson v. Ames*, 181 Ia. 65, 162 N. W. 858.

Kansas. *Evans v. Hutchinson*, 99 Kan. 477, 162 Pac. 342.

Kentucky. *Schmidt v. Newport* (Ky. 1919), 212 S. W. 113; *Tudor v. Louisville*, 172 Ky. 429, 189 S. W. 456; *Covington v. Westbay*, 156 Ky. 839, 162 S. W. 91; *Lebanon v. Graves*, 178 Ky. 749, 199 S. W. 1064, 1068; *Louisville v. Hans*, 167 Ky. 160, 180 S. W. 65.

Louisiana. *Smith v. New Orleans*, 135 La. 980, 983, 66 So. 319, citing § 2814, vol. 6, ante.

Maryland. *Baltimore v. Bassett*, 132 Md. 427, 104 Atl. 39.

Massachusetts. *Hamilton v. Cambridge*, 219 Mass. 418, 106 N. E. 1018.

Minnesota. *Estabrook v. Duluth* (Minn. 1919), 172 N. W. 123; *Weide v. St. Paul*, 126 Minn. 491, 148 N. W. 304; *Latell v. Cunningham*, 122 Minn. 144, 142 N. W. 141.

Missouri. *Rose v. Gunn Fruit Co.*, 201 Mo. App. 262, 211 S. W. 85; *Ledbetter v. Kirksville*, 167 Mo. App. 195, 151 S. W. 228;

municipal authorities to exercise an active vigilance over the streets; to see that they are kept in a reasonably safe condition for travel. They cannot fold their arms and shut their eyes and say they have no notice. After a street has been out of repair so that the defect has become known and notorious to those traveling the street and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligence.”³⁶

No undeviating rule can be established as to the precise length of time a defect must have continued to justify the presumption of knowledge in time to have remedied it prior to the injury.³⁷ The period will necessarily vary and be controlled by the circumstances, as presented by

Barnes v. St. Joseph, 151 Mo. App. 523, 132 S. W. 318; Rickards v. Kansas City, 181 Mo. App. 336, 168 S. W. 845; Benton v. St. Louis, 248 Mo. 98, 154 S. W. 473; Sutter v. Metropolitan St. Ry. Co. (Mo.), 188 S. W. 65, 68.

New York. Schmidt v. New York, 167 N. Y. S. 23, 179 App. Div. 667; O'Brien v. New York, 170 N. Y. S. 592, 594.

North Carolina. Seagraves v. Winston, 170 N. C. 618, 87 S. E. 507; Foster v. Tryon, 169 N. C. 182, 85 S. E. 211.

Oklahoma. Cushing v. Bowdlear (Okl.), 171 Pac. 561; Bellevue Gas & Oil Co. v. Carr (Okl.), 161 Pac. 203; Lawton v. Hills, 53 Okl. 243, 156 Pac. 297.

Oregon. Cartano v. Athena, 90 Or. 586, 176 Pac. 789.

Pennsylvania. Llewellyn v. Wilkesbarre, 254 Pa. 196, 98 Atl. 886.

South Dakota. Gellenbeck v. Mobridge, 140 S. D. 157, 166 N. W. 631.

Tennessee. Elrod v. Franklin, 140 Tenn. 228, 204 S. W. 298, 302.

Texas. Ft. Worth v. Weisler (Tex. Civ. App. 1919), 212 S. W. 280.

³⁶ Delmar v. Venables, 125 Md. 471, 94 Atl. 89, 91.

³⁷ Irwin v. Kansas City, 173 Mo. App. 711, 716, 160 S. W. 30.

Hole in a street around an iron pipe and water faucet, from four to eighteen inches deep and some three feet wide, existing for more than two months and a half is presumptive notice to city. Pickens v. Kankakee, 200 Ill. App. 547.

Sufficiency of allegation of notice to city. Ardmore v. Fowler (Okl.), 153 Pac. 1117.

Sufficiency of petition charging notice of city due to lapse of time of a defect in a sidewalk in a public street consisting of a stairway with a rail and banister on one side, to protect pedestrians. Kingery v. Jefferson City (Mo. App.), 190 S. W. 976.

the evidence in the given case.³⁸ Each case must depend on the facts peculiar to it.³⁹ Moreover, the period of time alone of the existence of the defect does not always determine the point of notice. Time is one element only to be considered. The nature of the defect, whether patent or latent, one likely to be observed by passers-by, in the day time,⁴⁰ as an excavation or ditch, or building material, or other obstruction open and notorious, or whether the defect is hidden or concealed,⁴¹ as the rusting away of the underside of a metal coal hole covering.⁴² As to the former, a short time only would be required to disclose such obvious defect to vigilant municipal officers, whereas, concerning the latter, the defect might exist for a long period of time, even years, without discovery by the exercise of reasonable care of the streets on the part of the municipality. Furthermore, it is important to take into account the location of the defect, whether in a business or resident section, whether in a thickly settled or sparsely populated district, and whether the defect is in a street much traveled.⁴³

§ 2815. Same—latent defects.⁴⁴

If the injury results from a latent defect in a public

³⁸ Fact question. *Miller v. Missouri Wrecking Co.* (Mo. App.), 187 S. W. 45; *Wolford v. Grinnell*, 179 Ia. 689, 161 N. W. 686; *Johnson v. Ames*, 181 Ia. 65, 162 N. W. 858; *Killeen v. St. Cloud*, 136 Minn. 66, 161 N. W. 260; *Junkins v. Stoneham* (Mass. 1919), 125 N. E. 140.

³⁹ Sidewalk defective existing for a considerable time. *Devlin v. St. Louis*, 252 Mo. 203, 207, 158 S. W. 346.

Defect existing for more than a year is sufficient time for the city to repair. *Newport v. Lewis*, 155 Ky. 832, 160 S. W. 507.

Sign projecting over sidewalk

one month. *Baillie v. Wallace*, 24 Idaho 706, 135 Pac. 850.

⁴⁰ Ring in an iron door in a much-traveled sidewalk for two years. *Cannon v. Worcester*, 225 Mass. 270, 114 N. E. 306.

Board sidewalk, old, dilapidated, a portion of the board was gone, all of that which was out of repair was clearly visible. *Warner v. Wayne*, 95 Neb. 682, 146 N. W. 934.

⁴¹ Section 2815, post.

⁴² *District of Columbia v. Wood*, 41 App. D. C. 101, 106, 107.

⁴³ *Peterson v. Seattle*, 100 Wash. 618, 171 Pac. 657.

⁴⁴ *Hesse v. New York*, 173 N.

way, in the absence of express notice, in order to create liability the circumstances must be such that the proper officers of the municipality, in the diligent performance of their duties, would have obtained notice of the defective condition before the injury, if they had exercised reasonable care in inspecting the same with the view of keeping it in repair and in a state of safety to travelers, upon the street, and because of such neglect the defect remained unrepaired, and the injury sustained was directly attributable to that neglect.⁴⁵

§ 2817. Rules as to notice applied to snow and ice.⁴⁶

In actions against municipalities to recover for injuries caused by accumulation of snow and ice upon sidewalks,

Y. S. 827; *Hindle v. Joliet*, 200 Ill. App. 159; *Shippey v. Kansas City*, 254 Mo. 1, 20-23, 162 S. W. 137; *Green v. Philadelphia*, 63 Pa. Super. Ct. 121.

⁴⁵ *District of Columbia v. Wood*, 41 App. D. C. 101, 105, following *District of Columbia v. Payne*, 13 App. D. C. 500.

Question for jury. *Cartano v. Athena*, 90 Or. 586, 176 Pac. 789.

⁴⁶ *Carl v. New Haven* (Conn. 1919), 107 Atl. 502.

Whether city had notice of ice which was dangerous and constituted an obstruction on the pavement was held to be a question of fact. *Gross v. Pittsburgh*, 243 Pa. 525, 90 Atl. 365.

Snow and ice had packed on sidewalk, making rough and uneven places for some five or six days; held, to charge the city with constructive notice. *Williams v. New York*, 214 N. Y. 259, 108 N. E. 448.

Jury question as to whether there was a dangerous accumulation of

snow and ice on the sidewalk, and whether such dangerous condition existed for such a length of time that the city should have known of it and remedied it. *Kaiser v. New York*, 172 N. Y. S. 626, 184 App. Div. 866, following *Williams v. New York*, 214 N. Y. 259, 108 N. E. 448.

Ridge of ice had been on the sidewalk, where pedestrian fell, for four or five days before the accident. This charge was sustained: "Where the condition of the street has existed long enough to give a presumption of notice to the authorities of the city that the condition exists, then the city has such notice as a matter of law, because the streets are open and all people passing upon and down the street must see their condition, and policemen passing upon their beats must see their condition." *Llewellyn v. Wilkesbarre*, 254 Pa. 196, 98 Atl. 886.

In a thickly populated section of the city less time would be

the liability does not attach upon notice, either actual or constructive, but only after the lapse of a reasonable time after such notice for remedying the dangerous condition.⁴⁷

Statutes or charters provide that no action shall be maintained for damages or injuries to the person sustained solely in consequence of the existence of snow and ice upon any sidewalk, crosswalk or street unless written notice thereof, relating to the particular place was actually given to the municipality or a named board or officer, and there was a failure or neglect to cause such snow or ice to be removed, or the place made reasonably safe, within a reasonable time after the receipt of such notice. This provision, it was held did not apply to a case where the city itself unnecessarily created and continued in an icy condition one of its public cross-walks so dangerous as to constitute a nuisance.⁴⁸ The action is not forbidden where the street defect was caused by the city itself.⁴⁹

required to create a constructive notice than in sparsely settled districts. *Ibid.*

Pedestrian slipped on ice on sidewalk. The snow was followed by rain, producing slush on the sidewalk which by reason of travelers walking over it, became uneven. The temperature between the day of the snowfall and the day of the accident was variable. The snow and slush on the sidewalk prior to the day before the accident had not become frozen, and did not present any unusual or dangerous obstruction to travel. The day before the accident, and on the day of the accident, there was a fall in temperature, and the uneven snow and slush on the sidewalk became frozen. "This evidence falls short of establishing such an un-

usual and exceptional condition as is necessary to charge a municipality in cases of this character." A lapse of time sufficient to charge the municipality with constructive notice of that condition is required. *Gaffey v. New York*, 218 N. Y. 225, 112 N. E. 725, reversing 151 N. Y. S. 1117, 166 App. Div. 942, relying on *Harrington v. Buffalo*, 121 N. Y. 147, 150, 24 N. E. 186, and approving *Williams v. New York*, 214 N. Y. 259, 108 N. E. 448.

⁴⁷ *Kaiser v. New York*, 172 N. Y. S. 626, 628, 184 App. Div. 866.

⁴⁸ *McCarthy v. Fulton*, 161 N. Y. S. 1004, 175 App. Div. 293.

⁴⁹ *Minton v. Syracuse*, 158 N. Y. S. 470, 474, 172 App. Div. 39, applying the rule of strict construction against the city. *Wilson v.*

§ 2818. Question of fact.⁵⁰

IX. CONTRIBUTORY NEGLIGENCE.

§ 2820. Contributory negligence is defense.⁵¹

That contributory negligence may constitute a bar to recovery, apart from statute, it must be the proximate cause of the injury.⁵² By the terms of the statute of South Carolina plaintiff must allege and prove that his

Troy, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817.

⁵⁰ District of Columbia v. Washington, 44 App. D. C. 120; Foreman v. Crowley, 143 La. 654, 79 So. 210; Denver v. Rhodes, 24 Colo. App. 114, 131 Pac. 786; Frisbee v. Hawkeye Land Co., 170 Ia. 540, 153 N. W. 85; Hearn v. Waterloo (Ia. 1918), 169 N. W. 392; Irwin v. Kansas City, 173 Mo. App. 711, 160 S. W. 30; Lawton v. Hills, 53 Okl. 243, 156 Pac. 297; Posey v. National Bank, 243 Pa. 568, 90 Atl. 363.

Where only one inference can be drawn from the fact, question of notice is for the court. Eagan v. Covington, 166 Ky. 825, 179 S. W. 1026, 1029.

⁵¹ Alabama. Birmingham v. McKinnon (Ala.), 75 So. 487; Montgomery v. Ross, 195 Ala. 362, 70 So. 634.

Colorado. Koch v. Denver, 24 Colo. App. 406, 133 Pac. 1119.

Idaho. Smith v. Rexburg, 24 Idaho 176, 132 Pac. 1153.

Illinois. Gage v. Vienna, 196 Ill. App. 585.

Kentucky. Dudley v. Smithland, 174 Ky. 248, 192 S. W. 21.

Missouri. Chance v. St. Joseph, 195 Mo. App. 1, 190 S. W. 24;

Browning v. Aurora, 190 Mo. App. 477, 480, 177 S. W. 685.

Tennessee. Knoxville v. Cain, 128 Tenn. 250, 159 S. W. 1084.

Washington. MacDermid v. Seattle, 93 Wash. 167, 160 Pac. 290; Chase v. Seattle, 80 Wash. 61, 141 Pac. 180.

Pleading contributory negligence. Derrington v. Poplar Bluffs (Mo. App.), 186 S. W. 561; Wallower v. Webb City, 171 Mo. App. 214, 156 S. W. 48.

"A city may not leave open to travel by the public a defective street, and plead contributory negligence as a defense to an action for damages for personal injury where the contributory negligence consists merely of the plaintiff riding or traveling along the defective street which the city had left open for that purpose." Bickel Asphalt Paving Co. v. Yeager, 176 Ky. 712, 197 S. W. 417, 420.

⁵² Louisville v. Vaughn, 180 Ky. 681, 203 S. W. 546; Ward v. Salt Lake City, 46 Utah 616, 151 Pac. 905.

As driving at a speed forbidden by law and running into an excavation in the street. Hardy v. West Coast Const. Co., 174 N. C. 320, 93 S. E. 841.

injury was not brought about by his own negligent act, and that he did not negligently contribute thereto.⁵³

§ 2821. Ordinary care is test.⁵⁴

There is only one degree of care required of those using the public thoroughfares, and that is ordinary care,⁵⁵ or reasonable care,⁵⁶ the degree of care that an ordinarily prudent person would exercise under like conditions.⁵⁷ "Want of such care as a prudent man would exercise in view of the danger is the test of contributory

⁵³ *Stone v. Florence*, 94 S. C. 375, 78 S. E. 23.

"Ordinarily contributory negligence is an affirmative defense; but this statute requires the plaintiff to allege and to prove that she did not negligently contribute to her own injury." *Aughtry v. Columbia* (S. C. 1919), 98 S. E. 195.

⁵⁴ *Iowa. Frisbee v. Hawkeye Land Co.*, 170 Ia. 540, 153 N. W. 85; *Hall v. Shenandoah*, 179 Ia. 1192, 162 N. W. 575.

Illinois. Ballance v. Granite City, 188 Ill. App. 315; *Divine v. Chicago*, 178 Ill. App. 39; *Osborn v. Mt. Vernon*, 197 Ill. App. 267.

Kentucky. Brentlinger v. Louisville Ry. Co., 156 Ky. 685, 161 S. W. 1107.

Louisiana. Whalon v. Sewerage & Water Board, 142 La. 735, 77 So. 520.

Missouri. Wallower v. Webb City, 171 Mo. App. 214, 156 S. W. 48; *Stephens v. Eldorado Springs*, 185 Mo. App. 464, 472; *Forster v. Kansas City*, 153 Mo. App. 504, 507.

Nebraska. Lucas v. Omaha & C. B. St. Ry. Co. (Neb. 1920), 177 N. W. 786.

North Dakota. Jackson v. Jamestown, 33 N. D. 596, 157 N. W. 475.

New Hampshire. Miner v. Franklin, 78 N. H. 240, 99 Atl. 647.

Virginia. Richmond v. McCormack, 120 Va. 552, 91 S. E. 767.

Wisconsin. Carlson v. Washburn, 159 Wis. 619, 150 N. W. 976.

⁵⁵ *Louisville v. Haugh*, 157 Ky. 643, 163 S. W. 1101.

⁵⁶ *New Albany v. Kiefer* (Ind. App.), 123 N. E. 361.

Reasonable diligence. Smith v. Rexburg, 24 Idaho 176, 132 Pac. 1153, 1155.

Failure to exercise ordinary care is negligence. Tegtmier v. Covington, 183 Ky. 312, 209 S. W. 382.

"Contributory negligence," and "want of ordinary care," are not distinct. *Meidenbauer v. Pewaukee*, 162 Wis. 326, 156 N. W. 144, 147.

Instruction to jury as to contributory negligence. Hall v. Shenandoah, 179 Ia. 1192, 162 N. W. 575, 579.

⁵⁷ *Indianapolis v. Pell*, 62 Ind. App. 191, 111 N. E. 22.

negligence.”⁵⁸ The law requires that the pedestrian be “observant of where and how he is going, so as to avoid dangers which ordinary prudence would disclose.”⁵⁹ He is not bound to look for hidden dangers. He is required only to walk with his eyes open, observing his “general course and in the usual manner.”⁶⁰

§ 2822. Same—amount of care distinguished from degree of care.⁶¹

§ 2823. Same—amount of care as dependent on circumstances.

Certain conditions may demand the exertion of a greater amount of care than ordinarily required.⁶² Thus where the weather conditions are against the safety of anyone using the streets in certain seasons on account of the increased hazard, due to climatic conditions, a greater amount of caution is required of all pedestrians to constitute ordinary care.⁶³ What constitutes reasonable care is dependent upon the circumstances of each case, and it is well settled by the authorities that under circumstances of exceptional danger, due, for example, to the construction work which is being performed in the street, of which construction work plaintiff had knowledge, the exercise of reasonable care calls for the exercise of more than ordinary precaution, and for the use of such precautions as the unusual conditions require.⁶⁴

⁵⁸ Meek v. Nebraska Telephone Co., 96 Neb. 539, 148 N. W. 325.

⁵⁹ Boland v. Scranton City, 59 Pa. Super. Ct. 524.

Failure, to observe barricades and signals where street was undergoing repairs. Tegtmer v. Covington, 183 Ky. 312, 209 S. W. 382.

⁶⁰ Hebenheimer v. St. Louis, 269 Mo. 92, 101, 189 S. W. 1180.

⁶¹ Boddington v. Kansas City, 95 Kan. 189, 148 Pac. 252.

⁶² Daly v. Trinity Church, 176 N. Y. S. 734.

⁶³ Victor v. Carbis, 59 Colo. 92, 147 Pac. 331.

⁶⁴ Pedestrian fell on board covering over street excavation. Quirk v. Bradley Contracting Co., 161 N. Y. S. 296, 97 Misc. Rep. 368.

One driving along a street partially torn up and running into a large gas pipe in broad daylight, held not an exercise of due

To exercise ordinary care pedestrians are required to take notice of the conditions and the uses to which sidewalks may legitimately be put, as the location of hydrants for fire protection when placed near the curb, and when traveling at night of the location of lights.⁶⁵ On the other hand, "it cannot be said as a matter of law that the pedestrian is bound to keep his eyes glued to the walk on which he travels, or that he assumes the risk of every defect which close inspection of every foot or step may reveal. His duty in the premises is reasonable care and caution, but he has the right to assume that the city has also used reasonable care and caution to see that the walk it has provided for the public use is free from traps and defects which render it dangerous."⁶⁶ "Of course, ordinary care must be gauged by the circumstances of each case, likewise the use of the senses. What would be exceedingly careless in the day time might be entirely without fault on the part of one driving in the night."⁶⁷

care. "When one traveling along a public street sees, or otherwise receives notice, that such street is out of repair or torn up, he must look for obstructions and other dangers and avoid them if he can do so by exercising ordinary care." *Welch v. McGowan*, 262 Mo. 709, 172 S. W. 18, 20.

If by the exercise of ordinary care, the injured could have observed the danger—excavation—and avoided the injury. *Neely v. People's Ry. Co.*, 4 Boyce 457 (Del. Super.), 89 Atl. 211.

Pedestrian using a temporary sidewalk around the equipment and materials of a contractor doing street improvement. *Brentlinger v. Louisville Ry. Co.*, 156 Ky. 685, 161 S. W. 1107.

Unless the danger is great, pedestrian need not look at every

spot he steps upon or "feel his way." *Kelly v. Walsh*, 177 Mo. App. 318, 164 S. W. 135.

Where repair work is proceeding producing unusual condition, unusual care commensurate with such conditions is required. *Maloney v. Bradley Contracting Co.*, 146 N. Y. S. 242, 84 Misc. Rep. 452.

In crossing a street which is in course of reconstruction and has been excavated the pedestrian must exercise an amount of care commensurate with the danger encountered. *Knepfle v. Laufer*, 182 Ky. 514, 206 S. W. 788.

⁶⁵ *Rollins v. Winston-Salem*, 176 N. C. 411, 97 S. E. 211.

⁶⁶ *Geer v. Des Moines*, 183 Ia. 837, 167 N. W. 635.

⁶⁷ *Boddington v. Kansas City*, 95 Kan. 189, 148 Pac. 252.

Ordinary or reasonable care as applied to the use of automobiles in the public highways is treated elsewhere in this work.⁶⁸

§ 2824. Right to assume that street is safe.

It is well settled that, in the absence of knowledge to the contrary, persons using a street or sidewalk have a right to presume and to act on the presumption, that the way is reasonably safe for ordinary travel, whether by day or night.⁶⁹ While those using streets should not

⁶⁸ Sections 1394-1394D, ante.

⁶⁹ Alabama. *Vance v. Morgan*, 198 Ala. 149, 73 So. 406; *Birmingham v. Carle*, 191 Ala. 539, 68 So. 22, L. R. A. 1915F, 797; *Montgomery v. Ross*, 195 Ala. 362, 70 So. 634.

Delaware. *Neely v. People's Ry. Co.*, 4 Boyce 457 (Del. Super.), 89 Atl. 211.

Iowa. *Overton v. Waterloo*, 164 Ia. 332, 145 N. W. 889.

Indiana. *New Albany v. Stallings* (Ind. App. 1919), 124 N. E. 701.

Kansas. *Howard v. Osage City*, 89 Kan. 205, 132 Pac. 187.

Kentucky. *Bickel Asphalt Paving Co. v. Yeager*, 176 Ky. 712, 197 S. W. 417.

Missouri. *Alexander v. St. Joseph*, 170 Mo. App. 376, 379, 156 S. W. 729; *Schlinski v. St. Joseph*, 170 Mo. App. 380, 385.

Montana. *Irving v. Stevenville*, 51 Mont. 44, 149 Pac. 483; *Nilson v. Kalispell*, 47 Mont. 416, 132 Pac. 1133.

New York. *Willis v. Parker*, 225 N. Y. 159, 121 N. E. 810.

Oklahoma. *Fairfax v. Girard*, 35 Okl. 659, 131 Pac. 159.

Rhode Island. *Gilbane v. Lent*, 41 R. I. 462, 104 Atl. 77.

Virginia. *Bashford v. Rosenbaum Hdw. Co.*, 120 Va. 1, 90 S. E. 625; *Richmond v. McCormick*, 120 Va. 552, 91 S. E. 767.

West Virginia. *Corbin v. Huntington*, 81 W. Va. 154, 94 S. E. 38.

United States. *District of Columbia v. Aukward*, 45 App. D. C. 155; *Burke v. District of Columbia*, 42 App. D. C. 438.

User has right to assume city has performed its duty, and that a street is safe and if a portion is not safe, notice thereof would be given to public. *Sherwin v. Aurora*, 257 Ill. 458, 100 N. E. 938, affirming 168 App. Div. 320.

Pedestrians have the right to presume that at least the sidewalk is free from hidden or concealed dangers. *McNiell v. Cape Girardeau* (Mo.), 190 S. W. 327. But whether the pedestrian, in the absence of a knowledge of a defect has a right to presume that a sidewalk is free from defects which may be easily discovered by casual observation, appears in doubt in some states. *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566; *Smith v. Kansas City* (Mo.), 184 S. W. 82; *McNiell v.*

be heedless for their own safety, they are not required to consider that they are moving over unsafe ways,⁷⁰ and be constantly on the alert for obstructions or dangers, to which their attention has not been called,⁷¹ or which would not be discovered by the exercise of ordinary care.⁷²

Cape Girardeau (Mo.), 190 S. W. 327.

Guard railing around a basement entry may be assumed safe. *Weinburg v. Chicago*, 172 Ill. App. 77.

"The driver of the hack was under no duty to look for obstructions in the streets. He had a right to presume, in the absence of knowledge to the contrary, that the city had performed its duties and that the street was free from obstructions." *Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664, 667, per De Graffenried, J.

"The driver of an automobile has the right to assume that the street is in a safe condition for travel, and that the city has exercised a proper degree of diligence and caution to keep it so." *Kendall v. Des Moines*, 183 Ia. 866, 167 N. W. 684.

"A pedestrian making use of city walks is not bound to constitute himself an inspector of walks. He is not required at his peril to observe defects in the street and their location. He has the right to assume that, in the absence of knowledge to the contrary, these are in a reasonably safe condition, and if not, that the city will within a reasonable time put them in such condition, and can be charged with such knowledge of the condition of the streets

only when, acting as an ordinarily intelligent and observing man in the exercise of ordinary caution, he would likely observe this in passing over the streets and remember at the time in question. When out for a walk merely or on some errand or on the way to business, people usually are more or less absorbed in conversation or thought, or their attention may be diverted in some other way. Localities are often overlooked or passed unnoticed, and it cannot be said that the circumstance that plaintiff has passed that way at least once in a month from some time previous conclusively established that she knew, or as an ordinarily cautious person ought to have known the condition of the approach of the walk at the place in controversy. That issue was for the jury, as was also the issue as to whether, with such knowledge, she was justified in thinking she might pass over in safety and whether in so doing she exercised ordinary care for her own protection." *Hanson v. Anamosa*, 177 Ia. 101, 158 N. W. 591, 594.

⁷⁰ *Forster v. Kansas City*, 153 Mo. App. 504, 507, 133 S. W. 662.

⁷¹ *Jacobs v. Jacobs*, 141 La. 272, 74 So. 992.

⁷² *Burton v. Kansas City*, 181 Mo. App. 427, 168 S. W. 889, 892.

§ 2825. Duty to observe patent defects.⁷³

A traveler on a street is not authorized "to shut his eyes to open and obvious dangers, and pay no attention whatever to the condition of the highway in which defects may, although they should not, exist."⁷⁴ Thus one driving a wagon who fails to observe the conditions in the street and drops into a hole of considerable size which is plainly observable is guilty of contributory negligence.⁷⁵

⁷³ Overton v. Waterloo, 164 Ia. 332, 145 N. W. 889; Nilson v. Kalispell, 47 Mont. 416, 132 Pac. 1133; Stern v. Reading, 255 Pa. 96, 99 Atl. 367.

⁷⁴ Baltimore v. Bassett, 132 Md. 427, 104 Atl. 39.

Travelers are bound to look for open and obvious defects and avoid them if they can. Courbin v. Huntington, 81 W. Va. 154, 94 S. E. 38.

If defect is so obvious that a prudent person would not have used the sidewalk, no recovery, if not, for jury. Hill v. St. Joseph, 143 Mo. App. 389, 393, 128 S. W. 214.

Loose dirt in trench along curb observed by pedestrian, held precluded recovery. Adelman v. Uvalde Asphalt Paving Co., 169 N. Y. S. 167.

Driving into a gas pipe protruding, in a street torn up, for the purpose of laying gas pipes is contributory negligence. Welch v. McGowan, 262 Mo. 709, 719, 172 S. W. 18.

Pedestrian is not necessarily guilty of contributory negligence for failure to observe an open defect. New Albany v. Stallings (Ind. App. 1919), 124 N. E. 701, 703.

Pedestrian stepped on a piece of banana peeling on a sidewalk and fell and broke an arm. "Whether the presence of the banana peeling on the sidewalk was evidence of negligence on the part of defendant (city) or not is immaterial. The evidence showed that the defect was obvious. It did not require expert supervision to detect the banana peeling or to know of its danger." Aughty v. Columbia (S. C. 1918), 98 S. E. 195.

Right to assume city keeps streets safe, etc., does not mean that one traveling upon the streets may proceed blindly in the faith that the city has performed its public duty. Travelers must exercise ordinary care. Pedestrian tripping over a hose on sidewalk in daytime used in street repairing, held negligent. Cutshall v. Keokuk (Ia. 1918), 169 N. W. 677, 679, 680.

⁷⁵ Bean v. Philadelphia, 260 Pa. 278, 103 Atl. 727.

An automobile driver was held not to be guilty of contributory negligence when he saw dirt on a street due to the digging of a trench therein. Zimmer v. Schmitt, 167 Wis. 430, 167 N. W. 739.

§ 2826. Effect of knowledge of defects or dangers.

While mere knowledge on the part of the traveler of a defect or obstruction in a public way does not preclude recovery for injury caused thereby,⁷⁶ that is, use of the way with such knowledge does not constitute contributory negligence as a matter of law,⁷⁷ yet if the defect or obstruction is so obviously dangerous or unsafe that an ordinarily prudent person would not use the way in such

⁷⁶ *Vannort v. Chestertown*, 132 Md. 685, 104 Atl. 113; *Browning v. Aurora*, 190 Mo. App. 477, 480, 177 S. W. 685; *Lueking v. Sedalia*, 180 Mo. App. 203, 167 S. W. 1152; *Border v. Sedalia*, 161 Mo. App. 633, 144 S. W. 161; *Devlin v. St. Louis*, 252 Mo. 203, 207, 158 S. W. 346; *Krause v. Wilton* (N. D. 1918), 168 N. W. 172, distinguishing *Moeller v. Rugby*, 30 N. D. 438, 153 N. W. 290; *Henderson v. Field* (Tex. Civ. App.), 194 S. W. 1003.

"Knowledge of existing conditions in a street does not alone preclude a recovery." *Meek v. Nebraska Telephone Co.*, 96 Neb. 539, 148 N. W. 325.

"When a traveler has knowledge of a defect in a highway it does not follow as a legal conclusion that he must under all circumstances avoid the use of it and reach his destination in some other way." *Rufo v. Philadelphia*, 58 Pa. Super. Ct. 638, 640.

Is not conclusive that injured pedestrian was negligent. *Jimkins v. Stoneham* (Mass. 1920), 125 N. E. 140.

If the pedestrian had no knowledge of the particular defect which caused the injury, general knowledge of the defective condition of the sidewalk will not bar recovery.

Titus v. Montesano (Wash. 1919), 181 Pac. 43.

If one having knowledge of an obstruction on a sidewalk he is using, fails to exercise due care and is injured, he is precluded from recovery. *Butler v. Conroe* (Tex. Civ. App. 1920), 218 S. W. 557.

⁷⁷ *Thoorsell v. Virginia*, 138 Minn. 55, 163 N. W. 976; *Stretch v. Lancaster* (Mo. App.), 206 S. W. 388; *Seagraves v. Winston*, 170 N. C. 618, 87 S. E. 507; *Darden v. Plymouth*, 166 N. C. 492, 82 S. E. 829.

"Previous knowledge on the part of a person injured of a defect in a sidewalk does not per se establish negligence on his part." *Darden v. Plymouth*, 166 N. C. 492, 82 S. E. 829.

Use of a sidewalk known to be old and rotten is not contributory negligence, where the pedestrian fell in a coal hole of which he had no knowledge. *Sands v. Kansas City* (Mo. App.), 202 S. W. 294.

Mere knowledge on the part of a pedestrian of the defective condition of a sidewalk does not constitute his walking thereon negligence per se as a matter of law. *Ryan v. Chicago*, 187 Ill. App. 163.

condition,⁷⁸ recovery may be barred.⁷⁹ The elements nec-

⁷⁸ *Morris v. St. Louis & S. F. R. Co.*, 184 Mo. App. 106, 113, 168 S. W. 323; *Brady v. St. Joseph*, 167 Mo. App. 423, 426, 151 S. W. 234; *Carrier Mills v. Pritchard*, 199 Ill. App. 25.

"Where a defect is not of such character as to show it to be so unsafe or dangerous that a prudent person in exercise of ordinary care would not venture by or over it, a pedestrian in the exercise of ordinary care, who is hurt in passing over it may recover." *Bullard v. Independence* (Mo. App.), 176 S. W. 1066; *McIlhenny v. Kansas City*, 188 Mo. App. 218, 175 S. W. 108; *Devlin v. St. Louis*, 252 Mo. 203, 158 S. W. 346; *Morrissey v. Cleveland C. C. & St. L. Ry. Co.*, 61 Ind. App. 90, 110 N. E. 105, 108.

"It has often been held that a person in using a public traveled way is not bound at his peril to remember and avoid danger from a defect in such way with which he is familiar. In the absence of any reasonable excuse for not avoiding the danger, and a personal injury results, there is a presumption of negligence, but in case of such excuse, a jury question is presented as to whether ordinary care was exercised or not." *Rhineschmidt v. Tomah*, 162 Wis. 242, 155 N. W. 122.

Is not negligence per se, if used with appropriate care. *Andrews v. White Hall*, 184 Ill. App. 298.

Knowledge of a defect requires the exercise of a greater amount of care. *Roberts v. St. Joseph* (Mo. App.), 185 S. W. 1197, 1199, citing § 2826, p. 5749, vol. 6, ante.

The rule that a traveler may presume a street is safe and may act on the presumption does not always apply if the traveler knows of the defect, or has reason to believe that it exists, and if he uses the street he must exercise ordinary care to avoid injury. *Vance v. Morgan*, 198 Ala. 149, 73 So. 406.

"When a pedestrian has notice of the dangerous condition of a street he is bound to exercise care commensurate with the necessities of the situation, but even with such notice or knowledge, if his attention be momentarily diverted and he does not see the obstruction, he will not be denied a recovery." *Louisville v. Vaughn*, 180 Ky. 681, 203 S. W. 546.

Use of a public highway by a person having knowledge of its defective and dangerous condition does not of itself constitute contributory negligence but such knowledge requires increased caution on the part of the person so using it, and he is guilty of contributory negligence if he does not use caution commensurate with the apparent or known dangers. *Chase v. Seattle*, 80 Wash. 61, 141 Pac. 180.

⁷⁹ Icy condition of sidewalk, no contributory negligence. *Lucy v. Norwich* (Conn. 1919), 106 Atl. 762.

If a pedestrian is aware of the unsafe condition of a sidewalk, and if by using ordinary care in going upon it he could have avoided the injury, recovery is barred. *Whalon v. Sewerage & Water Board*, 142 La. 735, 77 So. 520.

essary to constitute contributory negligence in cases of this nature are that the person injured as an ordinarily prudent person must have known that the way was dangerous and unsafe, and also knew, or in the exercise of ordinary care for his own safety should have known that it was dangerous and imprudent for him to attempt to pass over it in such condition.⁸⁰

Finally, the issue as to plaintiff's contributory negligence depends upon (1) whether he knew, or in the exercise of ordinary care should have known, of the condition of the street or sidewalk; (2) if he knew or ought to have known, whether in the exercise of ordinary prudence he might have concluded that by exercising ordinary care he could pass over safely; and (3) whether in traveling that way with or without knowledge, actual or imputed, he exercised that degree of care an ordinarily prudent person would under like circumstances.⁸¹

Knowledge of an obstructed way when the pedestrian could have taken another way as convenient which was unobstructed precludes recovery. *Paugh v. Parsons*, 74 W. Va. 425, 82 S. E. 204, citing § 2726, vol. 6, ante.

Pedestrian had full knowledge of dangerous condition of the walk and it was slippery due to sleet. He did not exercise prudence and was held guilty of contributory negligence. *Victor v. Carbis*, 59 Colo. 92, 147 Pac. 331.

A pedestrian who passes over a sidewalk known to her to be dangerous, encumbered with many bundles, and is injured by a fall thereon is precluded from recovery. *Moeller v. Rugby*, 30 N. D. 438, 153 N. W. 290.

A pedestrian injured by fall over a pile of spalls or broken brick on a sidewalk who had passed over the sidewalk twice the same

day and had seen the pile held guilty of contributory negligence. *Bookwalter v. Mont Union Borough*, 258 Pa. 209, 101 Atl. 953.

⁸⁰ *Covert v. Lovilia*, 167 Ia. 163, 149 N. W. 67.

⁸¹ *Hanson v. Anamosa*, 177 Ia. 101, 158 N. W. 591, 593, 594.

Instruction to jury considered. *Stephens v. El Dorado Springs*, 185 Mo. App. 464, 171 S. W. 657, 660.

An instruction that if the walk was dangerous and plaintiff knew it was dangerous, or could have known it by the exercise of ordinary care, and yet negligently attempted to walk on it and suffered injury, she is not entitled to recover is erroneous because it declares that the mere attempt to walk over such sidewalk is negligence. If the walk was not glaringly dangerous negligence on her part could arise only in the manner in which she went over it. On the other hand,

§ 2827. Same—forgetfulness.⁸²

“A traveler is not required to forego traveling upon a sidewalk because he has knowledge that it is defective. He has, as a general rule, a right to assume that it is safe; and when he is injured as a consequence of a defect of which he had previous knowledge, the mere fact of his previous knowledge does not per se establish contributory negligence. And this is also the rule where previous knowledge is coupled with absence of thought concerning the defect at the time of the injury, or momentary forgetfulness of it. Previous knowledge of a defect and forgetfulness of it are important facts to be considered in connection with all other circumstances in determining whether the party injured was exercising reasonable care; but it is not negligence as a matter of law for a person who had knowledge of a defect not to remember it at all times and under all circumstances. The foregoing rules, which are founded upon reason and experience, are of general acceptance.”⁸³ While a plaintiff cannot rely on forgetfulness or oversight of the defect to relieve him from the duty to exercise ordinary care,⁸⁴ mere forgetfulness of the existence of the defect is not always conclusive evidence of contributory negligence, but is a circumstance to be considered.⁸⁵ In the absence

if the walk was so glaringly dangerous that an ordinarily prudent person would not have used it, and plaintiff knew of the defect, the mere attempt to use the walk would be negligence. *Morgan v. Kirksville* (Mo. App.), 179 S. W. 755.

⁸² *Birmingham v. Edwards* (Ala.), 77 So. 841, 844 (quoting with approval from § 2827, vol. 6, ante); *Ludlow v. Stetson*, 163 Ky. 327, 173 S. W. 806.

⁸³ *Jackson v. Grand Forks*, 24 N. D. 601, 140 N. W. 718, 722, quoting from *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359.

⁸⁴ *Stephens v. El Dorado Springs*, 185 Mo. App. 464, 171 S. W. 657, 660, approving *Wheat v. St. Louis*, 179 Mo. 572, 580, 78 S. W. 790, 64 L. R. A. 292.

⁸⁵ *Gibbs v. Monett*, 163 Mo. App. 105, 110, 111, 145 S. W. 841.

Plaintiff knew of the defective condition of the sidewalk, but he testified that it was quite dark when the accident happened, that it was snowing quite hard, and that his mind was occupied with something else, and that he forgot about the danger when he stepped from the higher to the lower level. Contributory negligence was held to

of a reasonable excuse forgetfulness may preclude recovery, as where a pedestrian walking in the dark fell over stakes driven in the ground at the edge of the sidewalk.⁸⁶

§ 2828. Same—choice of ways.⁸⁷

A pedestrian need not keep near the center of the sidewalk, the course generally followed by the public. As a matter of law he may travel on any part of the walk. The law does not reserve any part of an unobstructed walk from use by the public.⁸⁸ But where a pedestrian walking on a pavement in the day time, had her attention called to its condition and she was familiar with it, chose to avoid mud and water that had gathered over sunken bricks and stepped upon the curb which she knew and saw was rounded, and where it was possible for her to have taken a few steps to either side of the depression and passed over in safety, the absence of due care under the circumstances clearly appears.⁸⁹ "A traveler is not bound to select other and better routes of travel, if he believed and had the right to believe that he could with

be a question of fact for the jury. *Robinson v. Oconto*, 154 Wis. 64, 142 N. W. 125.

Plaintiff was injured by falling down granitoid steps placed in, or as a continuation of one of the sidewalks of a street. "As to contributory negligence, notwithstanding plaintiff knew the steps lead from the sidewalk down to the street at that place, yet there was no lights, and plaintiff could not see, and he thought he had not yet arrived at the place when he fell," and hence, it is a question of fact. *Burkheimer v. Sedalia* (Mo. App.), 200 S. W. 298 (relying on *Graney v. St. Louis*, 141 Mo. 180, 184, 42 S. W. 941, and *Culverson v. Maryville*, 67 Mo. App. 343, 347.

⁸⁶ *Knoxville v. Cain*, 128 Tenn. 250, 159 S. W. 1084.

⁸⁷ *Vannort v. Chestertown*, 132 Md. 685, 104 Atl. 113; *Rufo v. Philadelphia*, 58 Pa. Super. Ct. 638; *Paugh v. Parsons*, 74 W. Va. 425, 82 S. E. 204, citing § 2828, vol. 6, ante.

⁸⁸ *Kelly v. Spokane*, 83 Wash. 55, 145 Pac. 57, pedestrian stepped into a hole.

⁸⁹ With full knowledge she chose to step over the water onto the curb. It was negligence for the passer-by deliberately, knowingly and needlessly to subject herself to such danger. *Werthner v. Girard Ave. Farm Market Co.*, 218 Fed. 364, 134 C. C. A. 172.

safety use the walk over which he was passing.”⁹⁰ It is only when the danger is so great and apparent that ordinarily prudent persons would regard it as dangerous, and hence avoid it, that a court can say, as a matter of law, that the pedestrian using the most dangerous route is guilty of contributory negligence.⁹¹ If the person injured, therefore, has the choice of a reasonably safe way, but selects a way he knows is not safe, recovery will be barred.⁹²

Although a pedestrian has the right to assume that a street is in proper condition for public travel and is not required to be on the lookout for obstructions, he may nevertheless be guilty of contributory negligence, if while walking on a street he sees a defect and with knowledge of the dangerous condition walks thereon rather than choose a safe way which is equally open and obvious.⁹³ Thus a pedestrian may be guilty of contributory negli-

⁹⁰ *Covert v. Lovilia*, 167 Ia. 163, 148 N. W. 67; *Stevens v. Chariton* (Iowa 1918), 168 N. W. 310, 312; *Hensen v. Anamosa*, 177 Ia. 101, 158 N. W. 591; *McGee v. Jones County*, 161 Ia. 296, 142 N. W. 957, 48 L. R. A. (N. S.) 141; *DeWall v. Sioux City*, 181 Ia. 133, 164 N. W. 640.

⁹¹ *Shetulski v. Mount Carmel Borough*, 57 Pa. Super. Ct. 85, 88.

Pleading that pedestrian took a dangerous course as contributory negligence. *Birmingham v. Carle*, 191 Ala. 539, 68 So. 22, L. R. A. 1915F, 797.

⁹² Injured knew way was unsafe, and might have taken a safe way, held guilty of contributory negligence. *Carrie Mills v. Pritchard*, 199 Ill. App. 25.

Driving across bridge undergoing repair with full knowledge of conditions. Plaintiff had choice of another which was a safe way, held contributory negligence and

assumption of risk barred recovery. *Craine v. Metropolitan St. Ry.*, 246 Mo. 393, 403-408, 152 S. W. 24.

Pedestrian took a path not provided, but another had been which was reasonably safe, and fell over an embankment, and recovery was denied. *Marcus v. Medford*, 161 Wis. 155, 152 N. W. 816.

Rejected a well lighted public crossing and undertook to cross a street at a point where there was no crossing and fell into a hole. Negligence barred recovery. *Watts v. Plymouth Borough*, 255 Pa. 185, 99 Atl. 470.

Had three other better and safer routes, but took one at night not so safe and fell over an unguarded wall into a creek. Liability denied. *Haughney v. Mahanoy City Borough*, 264 Pa. 482, 107 Atl. 843.

⁹³ *Walker v. John Smith, T.* (Ala.), 74 So. 451.

gence who had slipped and fell on a sidewalk covered with rough ice just before he fell a second time and broke his leg, for which injury he sued for damages, where after the first fall, he could have crossed the street to a sidewalk that was entirely clear.⁹⁴

§ 2829. Traveling at night.

The duty to exercise ordinary care to keep public ways reasonably safe includes, of course, their proper condition for travel in the night time for the due protection of those using them for the purpose designed.⁹⁵ While the degree of care to be exerted by the traveler at night is uniformly declared "ordinary" or "reasonable," the amount thereof is necessarily dependent on the particular circumstances of each case.⁹⁶ It is clear that a

⁹⁴ "It may have been contributory negligence as a matter of fact, but we think it was a question for the jury." *Williams v. New York*, 214 N. Y. 259, 108 N. E. 448, following *Twogood v. New York*, 102 N. Y. 216, 6 N. E. 275.

The crossing upon which the pedestrian fell was covered with snow and rough ice. "Whether another and safer way was conveniently open to her, and whether she did or in the exercise of ordinary care and prudence should have appreciated and known the dangerous condition of the crossing before attempting to pass over the same, and whether she was in fact negligent in attempting to do so, were all questions of fact to be submitted to the jury." *DeWall v. Sioux City* (Iowa 1918), 164 N. W. 640.

⁹⁵ *Connor v. Nevada*, 188 Mo. 148, 161, 86 S. W. 256.

⁹⁶ *McKelvey v. Juniata Borough*

(Pa. 1919), 108 Atl. 205; *Francis v. West Plains* (Mo. App. 1919), 216 S. W. 808.

Excuse for inattention. *Birmingham v. Edwards* (Ala.), 77 So. 841, 845, citing § 2829, vol. 6, ante.

Care is a jury question. *State v. Baltimore*, 129 Md. 686, 99 Atl. 860; *Hall v. Flint*, 195 Mich. 638, 162 N. W. 270; *Henderson v. Fields* (Tex. Civ. App.), 194 S. W. 1003.

Falling over brick on sidewalk where place was dark is not negligence. *Sutter v. Metropolitan St. Ry. Co.* (Mo. App.), 208 S. W. 851.

Pedestrian fell on a sidewalk upon which there was a ridge of ice which he was prevented from seeing by reason of a light fall of snow a short time before the accident. *Llewellyn v. Wilkesbarre*, 254 Pa. 196, 98 Atl. 886.

One traveling at night is not guilty of contributory negligence for failure to see and guard against

greater amount of care should be invoked in traveling at night, when the ways, the condition thereof and the objects thereon cannot be observed so readily, than in the day time when the means of observation are superior. One traveling at night, with knowledge of defects in the

rope or cable stretched across a sidewalk, two or three inches from the surface. *Whitehall v. Hartman Const. Co.*, 149 N. Y. S. 518, 87 Misc. Rep. 184.

Female pedestrian traveling at night when it was quite dark fell at a point where a driveway passed over the sidewalk. There was between three and four inches difference in the levels of the driveway and sidewalk. Verdict for plaintiff was sustained. *Shafer v. Philadelphia*, 60 Pa. Super. Ct. 256.

Pedestrian stumbled over a projecting tree root on the sidewalk which extended above the level of the sidewalk some eight inches and had an opening like a horse-shoe in which his foot was caught. The night was dark and rainy, and the pedestrian was seventy-one years of age. *Richmond v. McCormack*, 120 Va. 552, 91 S. E. 767, 770.

A pedestrian fell in hole on sidewalk at night. A part of the pavement was taken up to enable a property owner to install a water pipe. After the installation of the pipe, the city filled the hole with sand and gravel, but the slab of paving material was not replaced. There was no warning light. *Thoorcell v. Virginia*, 138 Minn. 55, 163 N. W. 976.

Female pedestrian traveling at night stumbled over a defective curb which rose about four inches above the sidewalk. "Pedestrians

are not compelled to remain off the streets of a city because it is dark, but using the care demanded by the circumstances, they may go at any hour where business or inclination takes them, and they may assume that the municipality has performed its duty in keeping the streets in a safe condition for use both at night and during the day." *Wertz v. Williamsport*, 67 Pa. Super. Ct. 156, 159.

Injury due to automobile colliding with manhole which projected some seventeen inches above the street level, but which was covered with grass. Contributory negligence, held for the jury. *Wolfert v. Grinnell*, 179 Ia. 689, 161 N. W. 686.

At night time automobile ran into a pile of cement and other materials on the street. The defense relied on was that the driver failed to turn on his lights and that the automobile was running at an excessive rate of speed. The question of due care was held to be one of fact for the jury. *Ferry v. Waukegan*, 196 Ill. App. 81.

Horse and buggy traveling along a sidewalk fell into a ditch between the sidewalk and the driveway. Recovery was held barred. *Dudley v. Smithland*, 174 Ky. 248, 192 S. W. 21.

Pedestrian stepped into a hole in a sidewalk. Contributory negligence for the jury. *Cartano v. Athena*, 90 Or. 586, 176 Pac. 789.

way,⁹⁷ is required to use care in proportion to the danger,⁹⁸ or when he has a choice of a safer way, due care for his own protection, requires that it should be taken.⁹⁹

§ 2830. Pedestrian not on sidewalk or crosswalk.¹

Using the driveway of a street by a foot traveler upon finding the sidewalk obstructed is not necessarily con-

⁹⁷ *Stephens v. El Dorado Springs*, 185 Mo. App. 464; *Schlinski v. St. Joseph*, 170 Mo. App. 380, 156 S. W. 823.

Female pedestrian walking on a path on a very dark night fell over a water pipe. She was familiar with the path and assisted in making it. In view of the facts she was held guilty of contributory negligence. *Halliday v. Booth & Flinn*, 62 Pa. Super. Ct. 147, 149.

A traveler "is not necessarily guilty of negligence in attempting to pass over a public street or sidewalk which he knows to be dangerous, and this is true, even though on account of the darkness he cannot see so as to avoid the obstruction." *Diffenderfer v. Jeffersonville* (Ind. App.), 118 N. E. 836.

"A traveler who knows of a dangerous excavation in a sidewalk is not guilty of contributory negligence as a matter of law, because, remembering conditions, he attempts in the darkness to pass around such excavation, but, misjudging the distance, falls into it when it is unguarded." *Welsh v. South Omaha*, 98 Neb. 148, 152 N. W. 302, per Rose, J.

⁹⁸ Pedestrian knew sidewalk which he attempted to pass over in darkness contained obstructions, held bound to use care in propor-

tion to danger. *Mooresville v. Spoon* (Ind. App. 1918), 118 N. E. 686; *Diffenderfer v. Jeffersonville* (Ind. App. 1918), 118 N. E. 836.

⁹⁹ Pedestrian took unsafe route and fell over an unguarded wall into a creek, when she had three other safer and better routes. Liability denied. *Haughney v. Mahanoy City Borough*, 264 Pa. 482, 107 Atl. 843.

On a night quite dark a pedestrian who undertook to pass over a way in a new part of the city which was unimproved, where the way was obstructed and the pedestrian had knowledge thereof, when he could have taken a safer way, equally convenient, cannot recover for injury because of his contributory negligence. *Paugh v. Parsons*, 74 W. Va. 425, 82 S. E. 204, citing § 2829, vol. 6, ante.

¹ *District of Columbia v. Aukward*, 45 App. D. C. 155, 161; *Ward v. Salt Lake City*, 46 Utah 616, 151 Pac. 905; *Ft. Worth v. Weisler* (Tex. Civ. App.), 212 S. W. 280.

Pedestrian walked in the middle of the street at night and stepped into a depression therein, held he could not recover under facts. *Carroll v. New Orleans Ry. & Light Co.*, 132 La. 683, 61 So. 752.

Pedestrian fell into a hole in the

tributory negligence as a matter of law.² A pedestrian leaving a sidewalk for a parkway cannot assume the latter to be free of obstructions.³

driveway in a street in which she was walking at night, leading a four year old child and carrying a two year old infant in her arms. Verdict in favor of injured pedestrian was sustained. *Connor v. Nevada*, 188 Mo. 148, 86 S. W. 256.

² As the sidewalk was encumbered with building material the pedestrian took the carriageway which was in like manner partly encumbered and in so doing the pedestrian was not guilty of contributory negligence. "Plaintiff was within her rights when she took the carriageway. The street and all of it was for public travel. Of course, knowing that stray bricks were on the carriageway she was required to proceed cautiously." *Superior v. Olt*, 239 Fed. 100, 102, 152 C. C. A. 150.

³ The injured pedestrian left the sidewalk and undertook to cross at an angle the grass plot, surrounding a line of trees along the street laid out between the sidewalk and the gutter line marking the boundary on that side of the way made for and devoted to the use of vehicles, and in so doing he tripped and fell over a wire that was fastened to two stakes set in the opposite corners of the grass plot that ended on a line with the intersecting avenue. Neither the wire or the stakes were obstructive of the paved walkway on either the avenue or the street intersecting it. "Travelers in streets to which respective parts are im-

proved for and apportioned to a walkway and to the use of vehicles, etc., may assume that these ways are free from unlawful obstructions or dangerous defects, so long as ordinary care on their part does not advise them to the contrary, but a like assumption cannot be indulged in favor of a traveler who consciously leaves the way provided for one of his type, and, with knowledge that he is so departing attempts to move over the part of the street devoted to ornamentation, etc. The care required of such a one must consist with the circumstances his stated situation creates, for, with respect to movement by travelers over such plots, there cannot be imputed to municipalities the law-implied assurance to travelers using ways devoted to their use that they are reasonably safe and are free from harmful defects or dangerous obstructions. The known (to the traveler) fact that a distinct part of the street has been appropriated to a parkway, the lines which are made by an actual improvement design to facilitate the movement of persons and things over the street and marking their limits, is sufficient to warn the traveler, when he would leave the appointed way, that he may not act upon the assumption of freedom from obstruction that he may, in the exercise of ordinary care, rely upon where he is in the use of the way appointed for his movement. When a trav-

§ 2831. Same—crossing street other than on crosswalk.

Although a pedestrian may cross a street at any point he desires, without necessarily incurring the imputation of negligence,⁴ when he traverses a public highway between the regular crossings, he is bound to exercise an amount of care commensurate with the danger;⁵ and when he rejects the crossing and adopts another way "he takes upon himself the risk of every danger arising out of municipal neglect that would have been avoided had he used the established crossing." Where no reason is expressed for rejecting the crossing and no conclusion is derivable from the facts and circumstances of the case, except that the choice of way was inconsiderately and negligently made, it is negligence and the court should so say.⁶ In exercising the right of crossing the street

eler would cross a parkway in a street, which he may do unless prohibited by ordinance or statute, he must exercise due care to discover depressions or obstacles (guards) along the lines of the parkways and within its borders, for he cannot assume that such parkways are free from obstructions or depressions, since manifestly they are not appointed and approved for the general use of travelers." *Birmingham v. Carle*, 191 Ala. 539, 548, 549, 68 So. 22, 25, 26, L. R. A. 1915F, 797 (per McClellan, J.), differing from the conclusions in *Woodson v. Metropolitan Street Ry. Co.*, 224 Mo. 685, 123 S. W. 820, 30 L. R. A. (N. S.), 931, 20 Ann. Cas. 1039, and *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389.

⁴It is not negligence to cross a street at a place not a regular crossing. *Brahan v. Meridian Light & Ry. Co.* (Miss. 1918), 83 So. 467, 469.

"The rule in this state is that

pedestrians may cross the street at any point, without imputation of negligence." *Louisville v. Haugh*, 157 Ky. 643, 163 S. W. 1101.

"Pedestrians are not restricted to the use of established street crossing when attempting to pass from one side of the street to the other. They have a right to pass at whatever point they elect." *Watts v. Plymouth Borough*, 255 Pa. 185, 188, 99 Atl. 470.

"A pedestrian cannot be held to be negligent by the court, as a matter of law, when he attempts to cross a street between the regular crossings, but in exercising this right he must have due regard to the conditions of the traffic before he enters the cartway." *Anderson v. Wood* (Pa. 1919), 107 Pa. 658.

⁵*Virgilio v. Walker & Brehm*, 254 Pa. 241, 98 Atl. 815.

⁶*Watts v. Plymouth Borough*, 255 Pa. 185, 99 Atl. 470.

between the regular crossings the pedestrian must have due regard to the conditions of the traffic before he enters the roadway. If he deliberately attempts to cross a street when vehicles are rapidly approaching close by, and injury results, ordinarily he will be chargeable with such carelessness as to prevent a recovery of damages; but if he observes the traffic and it is far enough away that a pedestrian using ordinary care would deem it safe to go across in front of the approaching traffic, he is under no fixed duty to look back, though the circumstances may be such that in the exercise of due care it would become his duty so to look, and it would be negligence for him to disregard it.⁷

§ 2834. Negligence as attributable to persons under disability—children as negligent.⁸

⁷ *Anderson v. Wood* (Pa. 1919), 107 Atl. 658.

⁸ *Triay v. Richard Carvel Co.*, 158 N. Y. S. 739, 172 App. Div. 615.

Contributory negligence to be determined from the degree of capacity or intelligence of the child. *Alexander v. Statesville*, 165 N. C. 527, 81 S. E. 763, 766.

Standard of the law is that degree of care which could reasonably be expected of an ordinarily prudent boy of his capacity, age and experience under similar circumstances. *Bethel v. St. Joseph*, 184 Mo. App. 388, 171 S. W. 42; *Stern v. St. Louis*, 161 Mo. 146, 150, 61 S. W. 594, saying that a boy "is not deemed negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity."

A child of five years old is presumptively incapable of negligence. *Stone v. Florence*, 94 S. C. 375,

78 S. E. 23; *Tucker v. Buffalo Mills*, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957.

Boy nine years of age was injured on a bridge. Whether he exercised care of one of his age was for the jury. *Johnson v. Chicago*, 178 Ill. App. 210.

Child eleven years old was hurt by colliding with the loose end of barb wire fence, extending over a narrow sidewalk. "The measure of a child's responsibility is his capacity to see and appreciate danger, and while the measure varies with each additional year, the standard is the average capacity of others of his age and intelligence." *Mulligan v. Homestead Borough*, 243 Pa. 361, 90 Atl. 71.

Boy of thirteen scuffling in the street with another fell into a pool of hot water. *Curtis v. Grand Trunk Ry. Co.*, 178 Mich. 382, 144 N. W. 824.

"From time immemorial the status of a minor of tender years

§ 2835. Same—blind or infirm persons.

“It is not, as a matter of law, negligence for a blind person to walk unattended on a public street.” In a particular case a blind man fell into an open ditch in a street, it was held not to be error to decline an instruction to the jury that it was negligence for the blind man to use the streets without an attendant, or unless he constantly felt his way with his staff.⁹

In one case a pedestrian was wearing a bandage having prior to the accident broken his knee cap. He knew the condition of the street at the time he fell. The street was slippery from sleet. It appears he exercised no thought, care or caution whatever, and made no effort to avoid the danger. His contributory negligence was deemed plain.^{9a}

§ 2836. Same—intoxicated persons.¹⁰

Intoxication when proven may be taken into consideration by the jury as a circumstance in determining whether

has been recognized in law to be different from that of one of more mature years. The law recognizes that up to the age of seven years a child is incapable of such conduct as will constitute contributory negligence, and our courts have uniformly so stated the law in their instructions to juries.” *McDonald v. Spring Valley*, 285 Ill. 52, 120 N. E. 476.

“It is true, an infant under four years of age is not to be blamed for negligence; but as a corollary, municipal governments cannot foresee and guard against all the dangers incident to the rashness of children. Municipalities are not insurers of the lives and safety of children. The municipal authorities have a right to presume that for every child under

age of discretion there is some one of mature judgment on whom rests the specified duty and responsibility for the safety of the child.” *Biegel v. New Orleans* (La. 1918), 79 So. 867.

⁹ *Balcom v. Independence*, 178 Ia. 685, 160 N. W. 305, 311; *Victor v. Carbis*, 59 Colo. 92, 147 Pac. 331.

^{9a} *Victor v. Carbis*, 59 Colo. 92, 147 Pac. 331.

¹⁰ *Chance v. St. Joseph*, 195 Mo. App. 1, 190 S. W. 24, 26; *Schumm v. Anderson* (Tex. Civ. App.), 172 S. W. 1121.

Intoxicating as contributing to the accident, held question of fact. *Backer v. Aspinwall Borough*, 255 Pa. 541, 100 Atl. 479.

Drunkenness may bar recovery. *Glancy v. McKees Rocks Borough*, 243 Pa. 216, 89 Atl. 972.

the person injured was himself negligent at that time, and whether such negligence contributed to his injury.¹¹

§ 2838. Particular acts as contributory negligence.

A pedestrian in hurrying to board a street car who fails to see and avoid the shafts of a vehicle encumbering the street may be guilty of contributory negligence.¹² A pedestrian knowing the danger tried to pass over an icy sidewalk when he fell and was injured. Such act will usually establish his negligence; however, it may be rebutted by testimony showing that he exercised ordinary care.¹³ A pedestrian walking in the dark with no purpose of leaving the sidewalk, inadvertently stepped off over the edge into a hole which extended to the very edge of the sidewalk, was held not guilty of contributory negligence as a matter of law.¹⁴ But in a case where a pedestrian fell over some stakes driven in the ground at the edge of the sidewalk at night, knowing they were there, without offering a reasonable excuse for his forgetfulness that they were there, was held negligent.¹⁵ Plaintiff was injured by reason of an automobile overturning in order to avoid a pile of brick in a street. At the time he was a guest seated on the rear seat. He had no control over the chauffeur. The machine was violating the speed law. It was held that he was not guilty of contributory negligence by not objecting to the rate of speed and requesting the driver to drive slower.¹⁶ One passing over a street on a bicycle where only a part thereof is left open for travel—the street being in the course of reconstruction—was held not chargeable with contributory negligence. An open street is an implied invitation to make use of it, especially where at the par-

One injured while he was driven by intoxicated chauffeur. *Winston's Admr. v. Henderson*, 170 Ky. 220, 200 S. W. 330.

¹¹ *Diffenderfer v. Jeffersonville* (Ind. App.), 118 N. E. 836.

¹² *Louisville v. Vaughn*, 180 Ky. 681, 203 S. W. 546.

¹³ *Diffenderfer v. Jeffersonville* (Ind. App.), 118 N. E. 836.

¹⁴ *Hearn v. Waterloo* (Ia. 1918), 169 N. W. 392.

¹⁵ *Knoxville v. Cain*, 128 Tenn. 250, 159 S. W. 1084.

¹⁶ *Gary v. Geisrael*, 59 Ind. App. 565, 108 N. E. 876.

ticular time and place the street was being used constantly by vehicles of all kinds. If a street cannot be repaired without exposing the public using it to injury the obligation of the municipality is to close it until it is made reasonably safe, otherwise municipal liability may arise from injuries received thereon.¹⁷ A boy pedestrian 17 years of age was at the time of the accident and some weeks prior thereto using crutches to aid him in walking, one of his legs having been broken and the full use of it not having been recovered. He was walking on a sidewalk which was defective. The sidewalk was composed of brick and was much worn; the defect consisted of a hole of considerable size at the end of the walk adjoining a cement pavement, which hole resulted from the removal of a number of bricks from the pavement near the middle of the sidewalk. The pedestrian was familiar with the condition. Under the circumstances he was held not guilty of contributory negligence.¹⁸ A driver of an automobile is not guilty of contributory negligence in leaving a traveled part of the street in passing a vehicle and running into an excavation concealed by weeds.¹⁹

The following acts, inter alia, have been held in particular cases, not to constitute contributory negligence as a matter of law: Stepping from a street car into a hole in a street;²⁰ walking over brick on a sidewalk at night where the place was dark;²¹ stepping aside on meeting another traveler, and not observing the defect, a ridge of ice;²² at the time of the accident, the pedestrian was talking to her husband and not noticing the pitfall into which

¹⁷ *Bickel Asphalt Paving Co. v. Yeager*, 176 Ky. 712, 197 S. W. 417, 420.

¹⁸ *Shetulski v. Mount Carmel Borough*, 57 Pa. Super. Ct. 85.

¹⁹ *Lancaster v. Broadus* (Ky. 1919), 216 S. W. 373, 375.

²⁰ Street cars stop only a short time, and passengers are expected to alight with reasonable dis-

patch. They are not required to anticipate that the car will stop at a place unsafe for passengers to alight. *Covington v. Westbay*, 156 Ky. 839, 162 S. W. 91.

²¹ *Sutter v. Metropolitan St. Ry. Co.* (Mo. App.), 208 S. W. 851.

²² *Abbott v. Springfield* (Mo. App.), 210 S. W. 443.

she fell;²³ falling into an excavation in a street at night which had no warning sign of barriers or lights;²⁴ walking along a street in the night time in the ordinary way and tripping over a water pipe an inch in diameter which was placed an inch above such walk without a light to protect it;²⁵ pedestrian crossing a street diagonally and not on a cross walk on a dark night at a time when no street lights were burning and running into an obstruction;²⁶ sitting on a wheel barrow on a sidewalk with others where the sidewalks fell due to the giving way of the supporting timbers, without knowledge of such defective support;²⁷ driving a horse in a public street at a rate of speed forbidden by ordinance;²⁸ driving in a wagon down a steep incline, where the street was defective because of a "chuckhole" therein, and using all the care possible, as by setting brakes, and where the driver was not aware of the chuckhole.²⁹

"In the presence of a known temporary obstruction, which a very slight detour to one side will avoid, one who chooses under such circumstances, to step directly over the obstruction, must be held to do so at his own risk."³⁰ Where the injured pedestrian well knew the condition that the street was undergoing repair, and when he tripped and fell over the obstruction he had an umbrella which he held low before his face, as it was raining and the wind was blowing; it was held that he was guilty of contributory negligence.³¹

²³ Krause v. Wilton (N. D. 1918), 168 N. W. 172.

²⁴ Robinson v. Kansas City (Mo.), 181 S. W. 1004.

²⁵ Blackwell v. Seattle, 97 Wash. 679, 167 Pac. 53.

²⁶ Middleton v. Cedar Falls, 173 Ia. 619, 153 N. W. 1040.

²⁷ Mills v. Oquawka, 200 Ill. App. 119.

²⁸ Osborn v. Mt. Vernon, 197 Ill. App. 267.

²⁹ Richardson v. Seattle, 97 Wash. 521, 166 Pac. 1131.

³⁰ The pedestrian was injured by attempting to step over street railroad rails in returning from the street to the sidewalk. The rails were lying in the gutter near the curb. Culp v. Reading Transit & Light Co., 250 Pa. 164, 95 Atl. 391.

³¹ Heaphy v. United States Wood Preserving Co., 146 N. Y. S. 377, 161 App. Div. 161.

The following acts, *inter alia*, have been held in particular cases, to be contributory negligence: Knowingly permitting an intoxicated chauffeur to drive the automobile in which plaintiff was riding which met with an obstruction;³² driving a wagon into a hole in the street in day time when the hole was large and easily seen;³³ driving into a protruding gas pipe after the driver observed that the street was torn up for the purpose of laying gas pipes;³⁴ crossing a street undergoing reconstruction which was closed to the public, with full knowledge thereof;³⁵ colliding with a building that was being removed standing in the street on cribbing from four to five feet high;³⁶ motorcyclist exceeding the speed limit and running into an obstruction in a street.³⁷

§ 2839. Imputed negligence.³⁸

§ 2840. Burden of proof.³⁹

Under the South Carolina statute permitting an action for injury due to a defective street, causeway or bridge

³² *Winston's Admr. v. Henderson*, 179 Ky. 220, 200 S. W. 330.

³³ *Stern v. Reading*, 255 Pa. 96, 99 Atl. 367.

³⁴ *Welch v. McGowan*, 262 Mo. 709, 719, 172 S. W. 18.

³⁵ *Knepfle v. Lauffer*, 182 Ky. 514, 206 S. W. 788.

³⁶ Where one attempts to cross a street, and conditions which confront him are such as to suggest to an ordinarily prudent and reasonable person that danger was imminent, he is precluded from saying, "I did not see, and therefore am not at fault." *Lombardi v. Bates & Rogers Const. Co.*, 88 Wash. 243, 152 Pac. 1025, 1027.

³⁷ *Keevil v. Ponsford* (Tex. Civ. App.), 173 S. W. 518.

³⁸ *Louisville v. Heitkemper*, 169 Ky. 167, 183 S. W. 465.

The negligence of the driver of a public hack in which plaintiff was riding when injured when the hack ran into a pile of rock in the street, cannot be attributed to plaintiff, since over such driver he had no control. *Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664, 667.

³⁹ On plaintiff. *Cutshall v. Keokuk* (Iowa 1918), 169 N. W. 677.

Contributory negligence is an affirmative defense and must be proved. *Cushing v. Bowdlear* (Okl.), 177 Pac. 561.

By statute contributory negligence is a matter of defense, which need not be negatived by plaintiff by allegation and proof. *New Albany v. Stallings* (Ind. App. 1919), 124 N. E. 701.

where such defect was occasioned by the neglect or mismanagement of the municipality, the complainant must prove that he did not negligently contribute to his own injury.⁴⁰

§ 2841. Question of fact or law.

Whether the conduct of the travelers injured in the public way was such as to preclude recovery,⁴¹ or consti-

⁴⁰ *Aughtry v. Columbia* (S. C. 1919), 98 S. E. 195.

⁴¹ Where ordinarily prudent men many differ as to whether plaintiff acted with care, etc., fact question. *Louisville v. Monroe*, 163 Ky. 412, 173 S. W. 1107.

Whether a pedestrian's attempt to cross a ditch in the dark was negligence, held fact question. *Williamson v. Mullins* (Mo. App.), 180 S. W. 395.

Plaintiff's buggy dropped into a rut in the street. Where the character or kind of defect was such that a court could not say as a matter of law that he should observe it, it becomes a question of fact. *Deweese v. St. Joseph* (Mo. App.), 184 S. W. 905.

Pedestrian passing over a crossing undergoing repair. *McCarthy v. Stoneham*, 223 Mass. 173, 111 N. E. 698.

Pedestrian stepped into a hole in the street. *Terre Haute v. Lauda*, 58 Ind. App. 480, 108 N. E. 392.

Pedestrian fell into a hole in a sidewalk. *Gilbane v. Lent*, 41 B. I. 462, 104 Atl. 77.

Pedestrian fell into a coal hole in the sidewalk when the cover tipped. *Hebenheimer v. St. Louis*, 269 Mo. 92, 189 S. W. 1180.

Falling from bicycle. *Koch v. Denver*, 24 Colo. App. 406, 133 Pac. 1119.

Falling into open sewer trench near a crosswalk. *Williams v. Dobson Co.*, 139 Minn. 228, 166 N. W. 189.

Traveler fell into ditch. *Smith v. Marceline* (Mo. App.), 198 S. W. 1116.

Tripped over water pipe an inch in diameter located an inch above the sidewalk. *Blackwell v. Seattle*, 97 Wash. 679, 167 Pac. 53.

Stepping off sidewalk in the night time into an unguarded hole. *Dinneen v. Ottawa*, 200 Ill. App. 303.

Driving carefully wagon down a steeply graded street with "chuck holes" in roadbed, without the driver having knowledge of such defects. *Richardson v. Seattle*, 97 Wash. 521, 166 Pac. 1131.

Pile of gravel on sidewalk. *De Garmo v. Vogt*, 151 Ky. 847, 152 S. W. 969.

Pedestrian took the carriageway because the sidewalk was blocked with building material, and the carriageway was also partly so encumbered. *Superior v. Olt*, 239 Fed. 100, 152 C. C. A. 150.

Contributory negligence of pedestrian who was carrying a child

tuted contributory negligence, is generally a question of fact,⁴² whether the injury occurred in day time or night

and fell at defective street crossing, is one of fact. *Baltimore v. Mattern*, 133 Md. 14, 104 Atl. 478.

Injury resulting from an automobile accident where the machine is running at an excessive rate of speed. *Ferry v. Waukegan*, 196 Ill. App. 81.

⁴² *Georgia. Dalton v. Humphries*, 139 Ga. 556, 77 S. E. 790.

Iowa. Evans v. Des Moines, 169 Ia. 321, 151 N. W. 397.

Kentucky. Dayton v. Lory, 169 Ky. 94, 183 S. W. 252.

Massachusetts. Junkins v. Stoneham (Mass. 1919), 125 N. E. 140; *Williams v. Winthrop*, 213 Mass. 581, 100 N. E. 1101.

Missouri. Alexander v. St. Joseph, 170 Mo. App. 376, 156 S. W. 729; *Browning v. Aurora*, 190 Mo. App. 477, 177 S. W. 685; *Willis v. St. Joseph*, 184 Mo. App. 428, 171 S. W. 27; *Kingery v. Jefferson City* (Mo.), 190 S. W. 976; *Daneschocky v. Sieben*, 195 Mo. App. 470, 193 S. W. 966; *Clancy v. Joplin* (Mo. App.), 181 S. W. 120.

Michigan. Hall v. Flint, 195 Mich. 638, 162 N. W. 270; *Reperd v. Chapin*, 190 Mich. 19, 155 N. W. 706; *Curtis v. Grand Trunk Ry. Co.*, 178 Mich. 382, 144 N. W. 824.

Maryland. State v. Baltimore, 129 Md. 686, 99 Atl. 860.

New York. Meyers v. New York, 139 N. Y. S. 432, 154 App. Div. 713.

Nebraska. Meck v. Nebraska Telephone Co., 96 Neb. 539, 148 N. W. 325.

Pennsylvania. Ake v. Pitts-

burgh, 238 Pa. 371, 86 Atl. 268; *Smith v. Machesny*, 238 Pa. 538, 86 Atl. 493; *Backer v. Aspinwall*, 255 Pa. 541, 100 Atl. 479; *Gross v. Pittsburgh*, 243 Pa. 525, 90 Atl. 365.

Wisconsin. Hakenson v. Niellsville, 152 Wis. 594, 140 N. W. 281; *Madison v. Antigo*, 153 Wis. 448, 141 N. W. 287.

West Virginia. Courbin v. Huntington, 81 W. Va. 154, 94 S. E. 38.

United States. St. James v. Stacy, 203 Fed. 35, 121 C. C. A. 371.

"The general rule is that where there is a defect in the pavement, or an obstruction such as can easily be seen and avoided, the question of contributory negligence is for the jury." *Lebanon v. Graves*, 178 Ky. 749, 199 S. W. 1064, 1067.

Whether plaintiff was guilty of contributory negligence which proximately contributed to his injury in failing to observe steep steps before stepping is a question of fact. *Montgomery v. Ross*, 195 Ala. 362, 70 So. 634.

Where pedestrian fell on a sidewalk upon which there was a ridge of ice which he was prevented from seeing by reason of a light fall of snow a short time before the accident in the night time the question of his contributory negligence is one of fact. *Llewellyn v. Wilkesbarre*, 254 Pa. 196, 98 Atl. 886.

Where a sidewalk was covered with snow and ice which rendered it rough and uneven whether it was contributory negligence for a

time,⁴³ and whether the traveler had or did not have knowledge of the defect,⁴⁴ to be submitted to the jury in a proper charge or in appropriate instructions on the points of law arising in the particular case.

It is familiar law that, where there is substantial conflict in the evidence, or where from the established facts different inferences might reasonably be drawn, the question of contributory negligence is one for the jury; but where there is no substantial conflict in the evidence, or where but one inference can reasonably be drawn from the undisputed facts, the question becomes a legal one for the court.⁴⁵

pedestrian to pass over it was held to be a question of fact in a particular case. *Fogg v. Kansas City*, 187 Mo. App. 252, 173 S. W. 712.

Pedestrian had knowledge of defect, but was watching a passing vehicle when she stepped into a hole in the sidewalk, held contributory negligence was for the jury. *Madison v. Antigo*, 153 Wis. 287, 141 N. W. 265.

Contributory negligence for jury, where in driving a wagon across a ditch in the road the wagon jolted and the driver fell out. *Tubbs v. Berwick Borough*, 262 Pa. 203, 105 Atl. 57.

⁴³ Section 2829, ante.

⁴⁴ Section 2826, ante.

Although pedestrians know of defect, it is not contributory negligence as a matter of law, unless defect so obviously dangerous that an ordinarily prudent person would not use the walk. *Morris v. St. Louis & S. F. R. Co.*, 184 Mo. App. 106, 113.

⁴⁵ *Lombardi v. Bates & Rogers Const. Co.*, 88 Wash. 243, 152 Pac. 1025.

Illinois. *Powers v. Chicago*, 180

Ill. App. 355; *Brenner v. Chicago*, 182 Ill. App. 348.

Iowa. *Finnane v. Perry*, 164 Ia. 171, 145 N. W. 494; *Fountain v. Des Moines*, 164 Ia. 316, 145 N. W. 881; *Overton v. Waterloo*, 164 Ia. 332, 145 N. W. 889.

Kansas. *Dunfee v. Iola*, 92 Kan. 121, 139 Pac. 1029.

Kentucky. *Covington v. Westbay*, 156 Ky. 839, 162 S. W. 91; *Henderson v. Dennis*, 157 Ky. 192, 162 S. W. 820; *Louisville v. Haugh*, 157 Ky. 643, 163 S. W. 1101.

Louisiana. *Nessen v. New Orleans*, 134 La. 455, 64 So. 286.

Missouri. *Kelly v. Walsh*, 177 Mo. App. 318, 164 S. W. 135.

New York. *Finnegan v. Sunkenberg*, 145 N. Y. S. 1087.

Pennsylvania. *Gross v. Pittsburgh*, 243 Pa. 525, 90 Atl. 365; *O'Neill v. Philadelphia*, 244 Pa. 14, 90 Atl. 455.

Where there is no difference of opinion among intelligent and fair-minded men as to the contributory negligence of a plaintiff, the court will so declare as a matter of law. *Victor v. Carbis*, 59 Colo. 92, 147 Pac. 331.

Generally, the question is for

Under the Oklahoma Constitution, it appears that contributory negligence is a question of fact for the jury in all cases.⁴⁶

10. PROXIMATE CAUSE.

§ 2843. Defect in street must be proximate cause.⁴⁷

The right of action under the South Carolina statute is based upon the negligence or mismanagement which was the proximate cause of the injury. The city must not only be negligent, but its negligence must be the proximate cause of the injury.⁴⁸ And this doctrine is uni-

jury, unless it clearly appear that the only reasonable inference from the facts is that in the circumstances of the case an ordinarily prudent person would not have acted as did the plaintiff. *Gilbane v. Lent*, 41 R. I. 462, 104 Atl. 77.

⁴⁶ *Ada v. Smith* (Okl. 1918), 175 Pac. 924.

⁴⁷ *Georgia. Ovens v. Claxton Carriage & Hardware Co.* (Ga. App.), 100 S. E. 640.

Iowa. Jones v. Ft. Dodge (Iowa 1919), 171 N. W. 16.

Idaho. Baillie v. Wallace, 24 Idaho 706, 135 Pac. 850.

Illinois. Ladle v. Chicago, 204 Ill. App. 475.

Massachusetts. Neilson v. Worcester, 219 Mass. 88, 106 N. E. 579, 581.

Maryland. State v. Baltimore, 129 Md. 686, 99 Atl. 860; *Hagerstown v. Foltz*, 133 Md. 52, 104 Atl. 267.

Missouri. Kingery v. Jefferson City (Mo. App.), 190 S. W. 976.

New York. Collins v. New York, 173 N. Y. S. 451.

North Carolina. Alexander v.

Statesville, 165 N. C. 527, 81 S. E. 763, 765.

Pennsylvania. Bruggeman v. York, 259 Pa. 94, 102 Atl. 415; *Stern v. Reading*, 255 Pa. 96, 99 Atl. 367; *McDonald v. Philadelphia*, 248 Pa. 145, 93 Atl. 959; *Glancy v. McKees Rocks Borough*, 243 Pa. 216, 89 Atl. 972; *Shafer v. Philadelphia*, 60 Pa. Super. Ct. 256.

Texas. Young Men's Christian Assn. v. Jasse (Tex. Civ. App.), 183 S. W. 867; *Keevil v. Ponsford* (Tex. Civ. App.), 173 S. W. 518.

Washington. Woodworth v. Dayton, 89 Wash. 444, 154 Pac. 790.

Wisconsin. Green v. Reedsburg, 162 Wis. 101, 155 N. W. 938.

⁴⁸ *Aughtry v. Columbia* (S. C. 1919), 98 S. E. 195.

Whether defect was the proximate cause is generally a jury question. *Henry v. Philadelphia* (Pa.), 107 Atl. 315; *Tubbs v. Berwick Borough*, 262 Pa. 203, 165 Atl. 57; *Backer v. Aspinwall*, 255 Pa. 541, 100 Atl. 479; *Higginbottom v. Burnsville*, 113 Miss. 219, 74 So. 133; *State v. Baltimore*, 129 Md. 686, 99 Atl. 860; *Ft. Worth v. Patterson* (Tex. Civ. App.), 196

formly applied by the latest judicial judgments of the courts of last resort in the several jurisdictions.

S. W. 251; *Jones v. Caldwell*, 23 Idaho 467, 130 Pac. 995; *Covington v. Rosenberg*, 177 Ky. 411, 197 S. W. 786.

Automobile ran into a pile of stone in the street. *Zorn v. New York*, 147 N. Y. S. 70, 85 Misc. Rep. 45.

Horse took fright at a cow tethered in the street and became perfectly calm and again took fright at a burst of thunder. Held, the proximate cause of the injury was not due to the cow. *Stryker v. Montoursville Borough*, 57 Pa. Super. Ct. 100.

Automobile ran against a steel truss which divided the carriage-way of a bridge. The negligence complained of was the omission to light the bridge. The bridge on each side had brackets intended for lights. If the lights had been lit they would not have disclosed the central truss. Hence, even if the city was negligent in the respect claimed the injury did not follow as a proximate result. *Gaines v. New York*, 215 N. Y. 533, 109 N. E. 594, affirming 142 N. Y. S. 401, 156 App. Div. 789.

Pedestrian ran into a wire which he attempted to cross. The wire was being removed by city employees. Although the pedestrian may have been negligent, if those removing the wire could by the exercise of due care, measured by the conditions, have prevented the injury and failed, their omission may be regarded as the proximate cause of the injury. *Gladden v. Seattle*, 83 Wash. 412, 145 Pac. 418.

Where negligence is based on

the fact that plaintiff's team of horses became frightened at a circus wagon which the city negligently permitted to be left in the street and which constituted a nuisance, no recovery can be had if it appears that the horses became frightened at something else. *Stokes v. Sac City*, 155 Ia. 334, 136 N. W. 207.

Pedestrian slipped on a banana peel on a sidewalk. *Aughtry v. Columbia* (S. C. 1919), 98 S. E. 195.

Wheel of a rapidly moving vehicle struck a hole in the street, broke off the axle and struck and injured a pedestrian. Whether street defect was the proximate cause, held jury question. *Henry v. Philadelphia* (Pa. 1919), 107 Atl. 315.

A bull being driven along a street, stepped upon a scraper and fell into an excavation, was injured and died. The open excavation left unguarded in a public street open for travel was the negligence charged. "The leaving of the scraper at the point where it was, the stepping upon the scraper, and the slipping of the bull, were not independent, intervening causes of injury, in and of themselves. They were only incidents in the chain of causation, and not proximate cause of the injury." *Johnson v. Denison* (Iowa 1919), 173 N. W. 46, 49.

Instruction relating to failure to place lights at night on pile of brick against which plaintiff fell as proximate cause of injury. *Sutter v. Metropolitan St. Ry. Co.* (Mo. App.), 208 S. W. 851.

§ 2845. Concurring and intervening causes: defect in street need not be sole cause.⁴⁹

Although a municipality may not be liable for an accident occurring from the mere presence of ice and snow on the street if other elements of actionable negligence exist liability may arise.⁵⁰ If the defect consists in building material on the sidewalk extending into the street which compelled a pedestrian to pass around near the middle of the driveway where he was struck by an automobile negligently driven the municipality will be liable. The court expressed the opinion that where the character of the first wrong is such that an injury will naturally or probably result, though it is a result following another cause which has intervened, it is a result that should reasonably have been foreseen or anticipated by the first wrongdoer and he should be held liable. An intervening cause should not be held to excuse the first cause unless such intervening cause is one so unusual and so improbable as not to be reasonably foreseen or considered by an ordinarily prudent man. Otherwise,

⁴⁹ *Hammond v. Jahuke*, 178 Ind. 177, 99 N. E. 39; *Jones v. Sioux City* (Iowa 1919), 170 N. W. 445; *Holmquist v. C. L. Gray Const. Co.*, 169 Ia. 502, 151 N. W. 828; *Louisville v. Heitkemper*, 169 Ky. 167, 183 S. W. 465; *Morrison v. Ironwood*, 189 Mich. 117, 155 N. W. 477; *Brown v. St. John*, 187 Mich. 641, 154 N. W. 79; *Sutter v. Metropolitan St. Ry. Co.* (Mo. App.), 208 S. W. 851.

Vehicle struck a stone in the road, and immediately thereafter went partly over the embankment. "The fact that the stone in the road may have been a contributing cause for the accident does not relieve the defendant from liability, if the unrailed embankment was also a cause." *Miner*

v. Franklin, 78 N. H. 240, 99 Atl. 647.

⁵⁰ Sign suspended over street fell and struck pedestrian because of severe wind. It was claimed that act of God was proximate cause, etc. "Even if it were admitted that the wind was unprecedented on that day and that there had never been such a wind as that before, yet if the accident was not due entirely to this wind, but the strong wind in connection with the negligence of the defendant (city) operated as an efficient and contributory current cause, then the defendant would still be liable." The wind must have been the sole cause, to preclude municipal liability. *Purcell v. Stubblefield*, 41 Okl. 562, 139 Pac. 290, 292.

one could say, I will commit this negligent wrong, though I know, or believe, it will probably cause another negligent wrong doer—another intervening independent agency, to commit an injury. In referring to the Missouri decisions the court said that: “While here and there, there may be remarks in these courts which appear to support the idea that where an intervening, independent agency inflicts the injury, it disconnects the first cause and liberates the first defender; yet a reference to the cases, down to the last utterance on the subject by the Supreme Court, will disclose that that is not the rule by which such cases should be decided; and that our courts are in entire harmony with those above noted from other jurisdictions.”⁵¹

§ 2846. **Same—Massachusetts rule.**⁵²

§ 2848. **Same—act of injured person as concurring cause.**⁵³

§ 2851. **Same—application of rule where concurring cause is slippery condition, snow, ice, oil, etc.**

Although a municipality may not be liable for an accident occurring from the mere presence of ice and snow on the street if other elements of actionable negligence exist liability may arise.⁵⁴ Thus where there is an unsafe or dangerous hole or sunken place in a sidewalk and there is a fall of snow which wholly, or in great part, covers or so hides the hole from observation as to make it prob-

⁵¹ *Daneschocky v. Sieble*, 195 Mo. App. 470, 475, 477, 193 S. W. 966.

⁵² *Neilson v. Worcester*, 219 Mass. 88, 106 N. E. 579, quoting with approval from *Newton v. Worcester*, 174 Mass. 181, 187, 54 N. E. 521, 523.

⁵³ Defect in an automobile, it was held, was plainly the proximate cause of the injury where it

plunged through a board fence at the side of a bridge. *Swain v. Spokane*, 94 Wash. 616, 162 Pac. 991, L. R. A. 1917D, 754.

⁵⁴ *Taylor v. Spokane*, 91 Wash. 629, 633, 158 Pac. 478, 480, citing § 2845, vol. 6, ante, and approving *Smith v. Tacoma*, 51 Wash. 101, 98 Pac. 91, 21 L. R. A. (N. S.) 1018.

able that a pedestrian might step into it, and in the day time a pedestrian stepped into it resulting in injury, the municipality will be liable on account of the defect in the street. It is an instance of the municipality's negligence in permitting the hole concurring with natural additional cause attributable to the fall of snow.⁵⁵ In a Massachusetts case an automobile being driven on a street skidded, could not be controlled and collided with a milk wagon, which skidding resulted from the extraordinary slipperiness of the surface of the street due to oil, it was aptly said: "If the conduct of the driver of the automobile was cautious, then his intervention between the defect and the injury would not as a matter of law break the direct causal connection between the injury to the plaintiff and the failure of duty on the part of the defendant (city)." ⁵⁶

§ 2854. Same—runaway horse as proximate cause.⁵⁷

⁵⁵ *Cross v. Sedalia* (Mo. App.), 203 S. W. 648; *Lueking v. Sedalia*, 180 Mo. App. 203, 167 S. W. 1152.

⁵⁶ *Kelleher v. Newburyport*, 227 Mass. 462, 116 N. E. 806.

⁵⁷ *Hunt v. St. Louis* (Mo.), 211 S. W. 673; *Talliaferro v. Atchison T. & S. F. Ry. Co.* (Okla.), 160 Pac. 69; *Drake v. East Cleveland* (Ohio 1920), 127 N. W. 469.

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